

In the Matter of BURNSIDE STEEL FOUNDRY COMPANY and AMALGAMATED ASSOCIATION OF IRON, STEEL AND TIN WORKERS OF NORTH AMERICA, LODGE NO. 1719

Case No. C-339.—Decided June 7, 1938

*Steel Castings Manufacturing Industry—Interference, Restraint, and Coercion—Company-Dominated Union:* soliciting membership in; coercion to join; support; domination of and interference with formation and administration; discrimination in favor of, with regard to organizational activity in plant; activities of supervisors; disestablished as agency for collective bargaining—*Evidence:* ruling as to introduction of evidence of membership in union, not prejudicial to organization found to be company-dominated—*Discrimination:* charges of, not sustained—*Unit Appropriate for Collective Bargaining:* hourly paid production and maintenance employees, excluding watchmen, janitors, clerical and office employees, foremen, subforemen, and other supervisory employees; occupational differences—*Representatives:* proof of choice: comparison of list of employees and union membership lists—*Collective Bargaining:* employer's duty, includes duty to cooperate with union to a reasonable extent in an inquiry as to claim of representation; refusal to recognize representatives, as exclusive representative; negotiation in good faith: obstructing and delaying union's efforts to bargain; special form of remedial order: recognition as exclusive representative; negotiation.

*Mr. Jack G. Evans*, for the Board.

*Fyffe & Clark*, by *Mr. Albert J. Smith*, of Chicago, Ill., for the respondent.

*Mr. Benjamin Wham*, of Chicago, Ill., for the Foundry Workers.

*Mr. George Turitz*, of counsel to the Board.

## DECISION

AND

## ORDER

### STATEMENT OF THE CASE

Upon amended charges duly filed by Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1719, herein called the Amalgamated, the National Labor Relations Board, herein called the Board, by the Acting Regional Director for the Thirteenth Region (Chicago, Illinois), issued its complaint, dated October 8, 1937, against Burnside Steel Foundry Company, Chicago,

Illinois, 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), (3), and (5), and Section 2 (6) and (7), of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

In respect to the unfair labor practices, the complaint, as amended at the subsequent hearing, alleged in substance (1) that the respondent had refused to bargain collectively with the Amalgamated, in that it refused to recognize the Amalgamated as the exclusive representative of employees of the respondent, although the Amalgamated had previously been designated by the majority of such employees as their representative for the purposes of collective bargaining, and in that it negotiated in bad faith with respect to proposals made by the Amalgamated regarding rates of pay, hours of employment, wages, and other conditions of employment; (2) that the respondent caused the Union of Foundry Workers, a labor organization of its employees, herein called the Foundry Workers, to be organized, that the respondent solicited membership among its employees on behalf of the Foundry Workers, threatened employees with loss of employment and reduction of pay unless they became members, and otherwise encouraged and urged its employees to become members thereof, and gave it support; (3) that the respondent discharged and has refused to reinstate Joe Robinson, Dan Mikes, Walter Gizeski, William Akers, Leslie Smith, Otho Smith, William Hatcher, and Julius Statkus, employees of the respondent, for the reason that they joined and assisted the Amalgamated and engaged in concerted activities with other employees in the plant for the purposes of collective bargaining and other mutual aid and protection; (4) that the respondent urged its employees to refrain from joining, assisting, or retaining membership in the Amalgamated, and otherwise discouraged membership therein; and (5) that the respondent by said practices interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Copies of the complaint and a notice of hearing dated October 8, 1937, were duly served upon the respondent, upon the Amalgamated, and upon the Foundry Workers.

On October 13 and 20, 1937, the respondent filed its answers to the complaint and to an amendment of the complaint respectively. The respondent admitted that it had refused to recognize the Amalgamated as the exclusive representative of its employees for the purposes of collective bargaining, but alleged that it had no knowledge that the Amalgamated had been designated for that purpose by the majority of the employees. The respondent also admitted it

had "let out" of its employment the persons alleged to have been discharged because of union activities, but alleged that William Akers had been discharged for cause, and that the other persons mentioned had been "let out" because of a reduction of working force, due to a curtailment of business. Except as above stated, the respondent denied all the allegations that it had engaged in unfair labor practices.

On October 12, 1937, the Foundry Workers filed a motion to intervene and for other purposes. On October 13, 1937, the Acting Regional Director issued an order granting the motion in part, which order was amended at the hearing. The order as amended provided that the Foundry Workers be made a party to the proceeding for the purpose only of showing that it was a labor organization, that on or before June 23, 1937, and down to the issuance of the order, it represented a majority of the respondent's employees within the appropriate bargaining unit, and that certain allegations in the Foundry Workers' motion regarding the respondent's relationship to, and activities on behalf of, the Foundry Workers, were true. The order as amended is hereby affirmed, and the Foundry Workers' motion, except as granted by the said order, is hereby denied. Counsel for the Foundry Workers moved at the hearing that the order be modified by permitting it to answer the complaint and, in effect, to intervene for all purposes and to be placed on a parity with the Amalgamated. The motion was denied. The ruling is hereby affirmed.

Pursuant to the notice above mentioned a hearing was held at Chicago, Illinois, from October 14 to and including October 22, 1937, before Waldo Holden, the Trial Examiner duly designated by the Board. The Board, the respondent, and the Foundry Workers 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 the respondent, the Board, and, to the extent permitted by the order allowing intervention, the Foundry Workers.

During the course of the hearing the Trial Examiner made a number of rulings on motions and on objections to the admission of evidence, and, on motion of counsel for the Board, the complaint was dismissed, without prejudice, as to Joe Robinson, Dan Mikes, and Otho Smith. The Board has reviewed such rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

During the course of the hearing the respondent made several motions to dismiss the complaint, rulings on which were reserved by the Trial Examiner. On December 27, 1937, the Trial Examiner

filed his Intermediate Report, in which he granted the respondent's motions to dismiss the complaint to the extent of the allegations concerning Walter Gizeski, Leslie Smith, and Julius Statkus, but denied them with reference to all other allegations. He found that the respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (1), (2), (3), and (5), and Section 2 (6) and (7), of the Act, and recommended that the respondent cease and desist from such practices. He also recommended that the respondent, upon request, bargain collectively with the Amalgamated as the exclusive representative of certain of its employees, that it offer William Akers and William Hatcher employment in their respective former positions and make them whole for any loss of pay suffered by them by reason of their discharge, and that it withdraw all recognition from the Foundry Workers as bargaining representative of its employees and disestablish that organization. Exceptions to the Intermediate Report were filed by the respondent and by the Foundry Workers. The respondent also filed a brief which has been given careful consideration. On May 5, 1938, the parties were granted the right to apply, within 10 days from the receipt of notice of such grant, for oral argument or permission to file briefs, but no such application has been received. We hereby affirm the ruling of the Trial Examiner denying the respondent's motions to dismiss the complaint, except in so far as such ruling is inconsistent with our order below. We find the exceptions to the findings, conclusions, and recommendations without merit, save for those which are consistent with the findings, conclusions, and order set forth below.

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

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT

Burnside Steel Foundry Company is an Illinois corporation having its principal place of business and its sole plant in Chicago, Illinois. It is engaged in the business of producing steel castings for all purposes, but principally for agricultural implements, railroad equipment, automobiles, and trucks. It keeps no stock of its products on hand, but manufactures castings only to fill specific orders. The principal raw materials used by it are steel foundry scrap, crude silica sand, and alloy substances, such as manganese, silicon, chromium, and nickel. Between July 1, 1936, and June 30, 1937, the respondent received raw materials costing \$405,773.85, of which approximately 18 per cent originated outside of the State of Illinois. During that same period the respondent made sales

totaling \$1,141,103.78, of which approximately 42 per cent were shipped by it to customers located outside of the State of Illinois. The respondent is one of the largest firms in the type of business in which it is engaged. During the week ending June 12, 1937, it had 393 employees paid on an hourly basis.

## II. THE ORGANIZATIONS INVOLVED

The Amalgamated Association of Iron, Steel and Tin Workers of North America is a labor organization affiliated with the Committee for Industrial Organization. Lodge 1719 of that organization is a local thereof admitting to its membership all production and maintenance employees in the respondent's plant who are paid on an hourly basis, excluding, according to the testimony of an organizer for the Amalgamated, the office force, supervisory employees, watchmen, and janitors.<sup>1</sup> The Amalgamated and its members authorized the Steel Workers Organizing Committee, herein called the S. W. O. C., which is a subcommittee of the Committee for Industrial Organization, to act as collective bargaining agency on their behalf.

The Union of Foundry Workers is a labor organization incorporated under the laws of the State of Illinois, and not affiliated with any other labor organization. It admits to its membership all employees of the respondent, with the possible exception of those employed in supervisory capacities.

## III. THE UNFAIR LABOR PRACTICES

### A. *The refusal to bargain collectively*

#### 1. The appropriate unit

It is alleged in the complaint that the production and maintenance workers, excluding office employees, superintendents, foremen, subforemen, and other supervisory employees, constitute an appropriate unit. A representative of the Amalgamated contended that the appropriate unit consisted of the hourly paid production and maintenance employees, excluding the office force, "white-collar workers," supervisory employees, watchmen, and janitors. Officers of the Foundry Workers contended that, except for bosses and foremen, all classifications of employees, even clerks, should be included in the unit. The Trial Examiner found that the production and main-

---

<sup>1</sup> Several persons in the excluded classifications were nevertheless members of the Amalgamated. The record seems to indicate that such persons would not have full membership rights.

tenance workers, excluding office and supervisory employees, constitute an appropriate unit.

The reason given by the Amalgamated for excluding the watchmen and janitors was that such employees are in a special relationship to the respondent, the watchmen because of the nature of their responsibilities, and the janitors because their positions are somewhat in the nature of pensions. We think the reasons are valid, and that the watchmen and janitors are not to be considered within the unit. The "white-collar workers" were not definitely described, but as regards the respondent's hourly paid employees, the record indicates that the term was intended to refer to 19 employees classified as clerks and checkers, and one classified as a safety director. They will all be included herein within the term "clerical employees." The checkers and clerks have duties somewhat closely related to production, such as checking and making records of production, and taking care of patterns. Some of them work under foremen. In view of the type of labor employed in the respondent's plant generally, such employees would nevertheless seem to be closer to the management than to the production and maintenance employees, and we think they are not to be considered in the unit. The respondent has some employees, in addition to foremen and assistant foremen, who are paid by the month, but the record contains almost no information concerning them, except that it may be inferred they are very few. In any event no objection was raised to the unit urged by the Amalgamated's representative on the ground that it excluded monthly paid employees, and all parties acquiesced in the use of the list of hourly paid employees as the basis for determining the issues in this case, no other list of employees being offered. We therefore conclude that the monthly paid employees are not to be considered within the unit. Gang leaders, though paid by the hour, are deemed supervisory employees. The term "production and maintenance employees" is to be construed herein to refer to employees of the classifications set forth on the list of employees in evidence, except those classifications herein specifically excluded.

We find that the hourly-paid production and maintenance employees of the respondent, excluding watchmen, janitors, clerical and office employees, foremen, subforemen, and other supervisory employees, constitute a unit appropriate for the purposes of collective bargaining and that said unit insures to employees of the respondent the full benefit of their right to self-organization and collective bargaining and otherwise effectuates the policies of the Act. The Trial Examiner's finding as to the appropriate unit is hereby modified in accordance with this finding.

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

The list introduced in evidence of all the hourly paid employees on the respondent's pay roll for the week ending June 12, 1937, contains the names and employment classifications of 393 employees, of whom 364 were included in the appropriate unit.<sup>2</sup> The record indicates that the list shows with substantial accuracy who were employed by the respondent on June 14.

Several lists of the members of the Amalgamated were introduced in evidence. The lists were copied from the original membership cards,<sup>3</sup> which were available for inspection at the hearing, and no objection was made to the use of the lists instead of the cards. Counsel for the Foundry Workers objected to the lists on the ground that the signatures on the cards had not been identified, that the persons signing had not been shown to have been employees, and that the dates were not shown to have been accurate. The objections were overruled. In view of our finding in subsection B below that the Foundry Workers was company-dominated, it could not in any event have been prejudiced by the ruling. Counsel for the respondent did not object to the admission of the lists in evidence, and at no time during the hearing did he raise the objections made by counsel for the Foundry Workers. He did, however, object to the admission in evidence of a list showing the dates when the district director of the S. W. O. C. had forwarded to the regional office of that organization certain membership reports of the Amalgamated's subdistrict. These reports were the ones showing that persons whose membership cards were undated had become members of the Amalgamated, and it was testified that the dates in question were in most cases 2 to 4 weeks later than the dates when the cards had been signed. The list objected to was made up by the secretary of the district director of the S. W. O. C. from regularly kept records of the organization, which were available for inspection at the hearing but which counsel for the respondent declined to inspect. The list seems to us to be a sufficiently reliable indication of dates prior to which the persons listed joined the Amalgamated, and it was properly received in evidence.

The list just mentioned shows that of the members of the Amalgamated whose cards were undated and who were employed by the respondent within the appropriate unit on June 14 at least 72 had joined the Amalgamated on or before that date. The lists of the members whose cards were dated show that on June 14 the Amalga-

<sup>2</sup> The 29 hourly paid employees not within the unit were classified as follows: 20 as clerical employees, 3 as watchmen, 2 as janitors, 3 as leaders, and 1 as assistant foreman.

<sup>3</sup> The membership cards signed by some of the persons on the lists were, on their face, for the S. W. O. C., but it was testified they were membership cards of the Amalgamated.

mated had at least 177 additional members who were employed on that day by the respondent within the appropriate unit. On June 14, therefore, at least 249 of the 364 employees within the appropriate unit had designated the Amalgamated as their collective bargaining agent.

We find that on June 14, 1937, the Amalgamated had been duly designated and selected by a majority of the employees in the appropriate unit as their representative for the purposes of collective bargaining. By virtue of Section 9 (a), of the Act, therefore, it was the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

### 3. The refusal to bargain

On June 8, 1937, a committee representing the Amalgamated met with H. F. Wardwell, president of the respondent, and two others of its officials. The committee, stating that a majority of the respondent's employees had joined the Amalgamated, presented a proposed tentative written agreement which, among other things, provided for recognition of the Amalgamated as the employees' exclusive bargaining agency, and provided that a 1-year contract would later be entered into covering wages and hours of work. Although Wardwell discussed the terms of the proposed agreement with the committee, he said he was doubtful as to whether or not the Amalgamated represented a majority of the employees, and he further stated that the respondent would in any event not sign a written agreement. The committee expressed confidence that the respondent would be willing to sign an agreement if it entered into negotiations in good faith. They suggested that the question of the Amalgamated's majority be determined by the Board, to which the respondent could submit its pay roll and the Amalgamated its membership cards. Wardwell requested time to consult his attorney concerning the proposed agreement. He assured the committee he would do anything the law required, and the conference adjourned in a friendly spirit.

The committee met with the respondent's representatives again on June 14. A committee member testified that he had the membership cards there with him, but admittedly they were not shown to the respondent. Wardwell told the committee he had considered the proposed agreement. He said, however, the respondent would sign no written agreement, since it had always got along with its employees without such agreements, and since the law did not require employers to make them. He stated also that the respondent would recognize the Amalgamated as the exclusive representative of the employees only if it was proved by "legal procedure" that a major-

ity desired representation by that organization. The committee again suggested that the respondent submit its pay roll, and the Amalgamated its membership cards, to the Board's Regional Office, which could then determine the question. Wardwell refused this suggestion and said the respondent would not submit its pay roll to anyone unless compelled to.

Wardwell explained at the hearing that his conception of legal procedure was not restricted to procedure for certification by the Board, and that if the Amalgamated had produced its cards, and a check thereof against the pay roll had demonstrated that a majority of the employees were members, he would have recognized the Amalgamated as the exclusive representative of the employees. Either his explanation or his statement to the committee was made in bad faith. The term "legal procedure", which Wardwell did not deny he had employed, does not by ordinary usage have the meaning he claimed for it. He himself, through his own attorney, used it at the hearing when he wanted to refer to a proceeding for certification:

Q. When you said in answer to Mr. Evans' question that you would have been glad to bring your pay roll before this Board did you mean in the following of the legal procedure you would be glad to bring the pay roll and all other papers before the Board?

A. Yes.

Q. And you did not mean to imply that you would have appeared with your pay rolls prior to the filing of a petition and the setting of a proper hearing?

A. No.

We think, therefore, that Wardwell intended to convey to the committee the impression which they actually got, namely that the respondent would recognize the Amalgamated as the employees' representative only if certified as such by the Board.

The committee withdrew without requesting another conference, and on June 23 the Amalgamated filed a petition with the Regional Director for investigation and certification of representatives pursuant to Section 9 (c), of the Act. Subsequently, with the permission of the Board, the petition was withdrawn.

Meanwhile, on June 8, 1937, the day of the respondent's first conference with the Amalgamated's committee, solicitation of members was commenced on behalf of the Foundry Workers. On June 23 a committee representing the Foundry Workers met with officials of the respondent and, it is claimed, presented 225 membership cards, together with an affidavit of the Foundry Workers' secretary as to the

organization's membership. The respondent thereupon recognized the Foundry Workers as the exclusive representative of its employees, subject only to a check of the cards against the pay roll, which was made shortly after the meeting. Negotiations were entered into concerning wages and various conditions of employment, and an agreement was subsequently reached, which, however, the respondent stated it would not reduce to writing.

On July 2, 1937, the Board wrote to the respondent informing it of the petition the Amalgamated had filed, and asking whether or not the respondent would consent to and cooperate in the holding of an election among its production employees to determine their exclusive representative for collective bargaining. The respondent refused, on the ground that the Foundry Workers had already furnished evidence that a majority of the employees had designated that organization as their collective bargaining representative. At the hearing Wardwell testified that an additional reason for refusing was that the respondent preferred that such an election be held pursuant to a full, regular proceeding, as provided by law.

The Amalgamated attempted in good faith to convince the respondent it represented a majority of the employees. Its proposal mentioned above was apparently a fair, practicable, and not unduly burdensome method of substantiating its contention. The respondent's officials simply rejected it, making no counterproposal other than that the Amalgamated obtain the Board's certification. Even according to Wardwell's testimony they indicated no respect in which they considered the method proposed by the Amalgamated unsatisfactory, but merely stated that the respondent would submit its pay roll to the Board only under compulsion. In the circumstances here set forth the respondent's duty to bargain collectively included the duty to cooperate with the Amalgamated to a reasonable extent in an inquiry as to that organization's claim to have been designated as exclusive bargaining representative. The respondent could not with impunity capriciously refuse to submit its pay roll to a representative of an agency such as the Board. If the method proposed by the Amalgamated to prove its majority was for any reason unsatisfactory, the respondent, if acting in good faith, would have stated such reason to the committee. It would, furthermore, not have taken the position that it would be satisfied with no evidence short of the Board's certificate,<sup>4</sup> and it will be noted that it did not take such a position when dealing with the Foundry Workers, only 9 days later. We are convinced that, in its negotiations with the Amalgamated, the respondent did not attempt to carry out its duty to cooperate in determining who

---

<sup>4</sup> See *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d, 1938), cert. den 58 S. Ct. 1046.

represented the employees, but sought only to obstruct and delay the Amalgamated's efforts to bargain for the employees. The respondent's alleged ignorance of the Amalgamated's status, therefore, could not constitute a justification for its failure to bargain with the Amalgamated as the employees' exclusive representative.

Wardwell stated at the hearing that the respondent had been willing to bargain with representatives of the Amalgamated as regards the Amalgamated's members. Such bargaining would not constitute compliance with Section 8 (5), of the Act. Since the Amalgamated was the exclusive representative of the employees, it was incumbent upon the respondent to recognize and negotiate with it as such, which the respondent refused to do.

We find that the respondent refused to bargain collectively with representatives of its employees within an appropriate unit, and that the respondent thereby interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

#### *B. The Union of Foundry Workers*

The idea of organizing a union in competition with the Amalgamated was first suggested, it was testified on behalf of the Foundry Workers, by Arthur Johnson, one of the respondent's machinists, in the latter part of May 1937. The Amalgamated had been organized on May 8 and had made considerable progress in a very short time. On June 3 a group of employees interested in the idea of a competing union retained an attorney, Benjamin Wham. They had requested Harry Siemon, an employee of the respondent, to find out who was the attorney for an independent union at the plant of the Link Belt Company, and he had brought back Wham's name. Though the record is not clear as to whether Siemon was at that time a truck driver or a gang leader, it is clear he had previously been a gang leader. It does not appear, however, that Siemon had anything to do with the formation of the Foundry Workers other than to report the name of the attorney at the request of other employees.

William Akers, secretary of the Amalgamated, testified that on June 3 or 4 he had a conversation with C. E. Westover, the respondent's superintendent, in the course of which Westover said an independent union was being formed in the plant, and that Westover had chosen as its leader Patrick Fleming, who later became president of the Foundry Workers. Akers gave a detailed account of the conversation and of the circumstances surrounding it. Westover denied he said anything to Akers about an independent union, although he agreed with Akers as to many of the circumstances under which the conversation took place. Comparing the two versions of the conversation, we find no reason to accept Akers' version in preference to

Westover's. In any event, in view of the additional facts set forth below, it is not necessary to decide this question.

The Foundry Workers held its first meeting on June 11, but solicitation of members commenced, as stated above, on June 8. Fleming testified he obtained the signatures of about 200 of the 225 employees who joined. According to the Board's witnesses, Fleming was free to go about the plant and carry on union activities even at times when he was not supposed to be there. Fleming admitted that he spoke to employees while they were at work and that he obtained 35 or 40 signatures during working hours. He could not perform his union duties and his job at the same time, and so, according to his testimony, he told his foreman he was ill and received permission to stay away from work. He did not work for 6 weeks, for which period, he testified, he received no pay or promise of pay of any kind. However, he continued to come to the plant on an average of at least twice a week, and probably oftener. It appears that he saw supervisory employees on these occasions.

Counsel for the Foundry Workers attempted to prove that representatives of the Amalgamated enjoyed similar privileges. His question on cross-examination of Joseph Germano, a representative of the S. W. O. C., as to whether or not Germano had received reports from officers of the Amalgamated that its representatives were soliciting members at the plant "on company time" in the presence of supervisory officials was erroneously excluded. The ruling, however, was not prejudicial. The portion of Germano's direct testimony on which the question bore was very general and not based on Germano's personal knowledge, and it is not relied on to support this decision. Counsel were given ample opportunity to bring out the facts concerning the Amalgamated's activities in the plant. The proof adduced does not support the contention of counsel for the Foundry Workers. Arthur Palermo, former vice president of the Amalgamated, who had gone over to the Foundry Workers, testified that he had solicited members for the Amalgamated among employees who were at work. However, he gave only two specific instances. Wardwell, the respondent's president, testified he had understood both organizations were soliciting members at the plant during working hours, but had thought it his duty not to interfere with either. Employees engaged in their tasks often walked about from one department to another, thus finding many opportunities to solicit union members while at work. George Penners, the president of the Amalgamated, once failed to deny Wardwell's statement made to him that such solicitation was being carried on by representatives of the Amalgamated. It appears also that Akers, secretary of the Amalgamated, solicited members at the plant outside of his own working hours.

It is clear, however, that the representatives of the Amalgamated did not enjoy the privilege exercised by Fleming of going about the plant at will conducting union business. Except for handing out some leaflets at the factory gate, Akers' union activities on the respondent's premises appear to have been carried on chiefly in the washroom. He was compelled, moreover, to use considerable ingenuity to get into the plant in his off hours, because the respondent kept a careful watch at the entrance and excluded persons not having business there. When a watchman reported Akers had got into the plant surreptitiously, the timekeeper said, "Just watch him, that's all; don't let him in there," and Westover, the superintendent, told the watchman, "Be careful, don't let anybody go down in the plant unless they have business there." Fleming's experience was entirely different. In spite of the policy in force, and although he claimed to have been given a leave of absence because of illness, he is not shown by the record to have had any difficulty getting in, or, having got in, to have made the least effort to keep his presence secret. He even went about in his street clothes. No explanation of this contrast was offered at the hearing. We are convinced that those in charge of the plant wilfully permitted Fleming to use the premises and the employees' time to solicit members for the Foundry Workers.

The record indicates, in spite of Fleming's denial, that Fleming warned employees whom he asked to join the Foundry Workers that they had better join if they wanted to keep their jobs. In view of the favored treatment Fleming's organizational activities received from the respondent, his warnings must have been construed by employees as having been authorized by the respondent.

Leslie Smith, William Hatcher, and Spencer Wilson, all of whom had worked in the furnace department, testified that Mitchell Jones, who also worked there, asked them to join the Foundry Workers; and Wilson said Jones told him he would be laid off if he did not join. This testimony was not contradicted. The three men also testified that Jones gave orders around the furnace and was a foreman or assistant foreman. The respondent's superintendent denied that Jones was a foreman or assistant foreman, claiming he was simply a melter. The record does not disclose the functions and duties of melters, except that they were described by the superintendent as skilled workers and as being "responsible for the furnace", and mention was made during the hearing of a foreman of melters. It was not denied that Jones did habitually give orders in the furnace room. Furthermore, the respondent's superintendent testified that the melters, including Jones, were paid by the month, as were foremen and assistant foremen, whereas almost all the respondent's other employees, including efficiency workers and clerks, were paid by the

hour. He explained that melters in the industry are commonly on salary, because their hours are irregular. In view of the uncontradicted testimony that Jones gave orders in the furnace department and occupied a position of some responsibility, and in the absence of a fuller explanation by the respondent of his duties, showing that his giving such orders was unauthorized, we conclude that Jones was a supervisory employee. The respondent is therefore responsible for what Jones said to Smith, Hatcher, and Wilson.

Counsel for the Board attempted also to show that several of the men who admittedly solicited members for the Foundry Workers were supervisory employees, and that Melvin Shaw, a foreman, told Julius Statkus he had better join the Foundry Workers. On the basis of the whole record, however, we do not think that those facts are sufficiently established.

We find that the respondent solicited membership among its employees on behalf of the Foundry Workers, threatened employees with loss of employment unless they became members of the Foundry Workers, contributed support to the Foundry Workers, and dominated and interfered with its formation and administration; and that the respondent, by the said acts, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

### *C. The allegedly discriminatory discharges*

The respondent's production fell off considerably in August and September of 1937. Approximate monthly production in 1937, in tons, was as follows: May, 553; June, 475; July, 566; August, 482;<sup>5</sup> and September, 330. Employment fell off correspondingly. Of the 393 hourly paid employees on the respondent's pay roll for the week ending June 12, 129 were laid off by October 16, and 22 quit, were discharged, or ceased to work for some other reason. Foremen of the respondent testified that in making lay-offs they took into consideration the men's ability and responsibilities, as well as their seniority. Eight new employees were taken on in approximately that period, but for various reasons their hiring does not appear to affect the cases of the men who were allegedly discharged for union activities. The record indicates that the persons claimed as members by the Foundry Workers did not constitute a substantially larger percentage of the employees after the lay-offs than they did before.

*Julius Statkus.* Julius Statkus was employed by the respondent in May or June of 1934 and was laid off about September 20, 1937. He joined the Amalgamated in May 1937 and attended meetings, but

<sup>5</sup> Roughly approximate weekly production in August was: week ending August 7, 125 tons; August 14, 120 tons; August 21, 94 tons; August 28, 94 tons.

was not especially active. He was requested by Fleming in June to join the Foundry Workers, but refused. He testified that Melvin Shaw, his foreman, warned him once, as Fleming was about to talk to him, that if he wanted to work, he knew "what to do," but Shaw and Fleming denied this. During the course of his employment Statkus had done several kinds of work in the part of the plant called the cleaning room. In July 1937 he was working as a pressman and was at his own request transferred to welding. When he was laid off, welders were retained who had worked in the respondent's plant a shorter time than he, but they had all been welders there longer, except for one who did a kind of welding Statkus was not trained to do. The record does not show how his seniority compared with that of employees doing other kinds of work in the cleaning room, except that all the pressmen retained had been employed longer than he. The foreman who had laid him off testified that Statkus was a good man and still on the pay roll and that he, the foreman, was looking for a job for him. Statkus said he did not want to go back without a decision by the Board in his favor since otherwise his seniority would be disregarded when future lay-offs were made.

The record affords insufficient basis upon which to sustain the charge that Statkus was discriminated against because he joined or assisted the Amalgamated, or because he engaged in concerted activities with other employees.

*Walter Gizeski.* Walter Gizeski was employed by the respondent on February 20, 1937, as a laborer in the machine shop, and was laid off about September 21, 1937. He also worked for the respondent for about 21½ months in 1934, and for a day in 1935. He joined the Amalgamated in the early part of May 1937, attended meetings, and induced 35 or 40 other employees to join. In the middle of June, Fleming asked him to join the Foundry Workers, telling him, according to his testimony (which Fleming denied), that he would lose his job if he was not careful. At about that time he asked to be allowed temporarily to substitute for men on vacation in the furnace room. He said he requested the transfer because he felt out of place in the machine shop, being the only one there not a member of the Foundry Workers. He also said he wanted to see the operations there. By the time the last man's vacation was over, the respondent had cut down its production considerably. Gizeski was put to work in the yard for a few days and then laid off by the yard foreman for lack of work. He said that one man in the machine shop was retained who had worked there a shorter time than he, but although that man was doing laboring work at the time of the hearing, he had been hired as an extra crane-man. One man in the

furnace room had less seniority than Gizeski, but the difference, disregarding Gizeski's short service in 1934, was only about 2 weeks. No one was kept in the yard gang with less seniority than Gizeski.

The record affords insufficient basis upon which to sustain the charge that Gizeski was discriminated against because he joined or assisted the Amalgamated or because he engaged in concerted activities with other employees.

*Leslie Smith and William Hatcher.* Leslie Smith was employed by the respondent about February or March 1935 and was laid off about October 7, 1937; William Hatcher was employed June 10, 1936, and was laid off on October 6, 1937. Both men worked in the "steel gang," in the furnace department. They joined the Amalgamated in May 1937 and both attended meetings and wore their union buttons at the plant, but they do not appear to have been especially active. Smith later joined the Foundry Workers, but Hatcher refused to do so. When they were laid off, several members of the steel gang, two of them gang leaders, were retained who had had less service than they. The foreman, Leo Dennie, testified that the gang had been reduced in September more than 50 per cent, and Hatcher and Smith had been among the last laid off. He said they were poor workers and had been kept so long only because of their seniority.

The record affords insufficient basis upon which to sustain the charge that either Smith or Hatcher was discriminated against because he joined or assisted the Amalgamated, or because he engaged in concerted activities with other employees.

*William Akers.* William Akers was employed by the respondent at the beginning of January 1937 as a welder. He was first discharged the following month, when he was apprehended in the act of doctoring the meter which measured the time electricity passed through his welding apparatus. The electricity normally flowed through such meters only while actual welding was being done, and the men's pay was based on their meter readings. Akers promised not to repeat the offense, and he informed the respondent of two other employees who had engaged in the same practice. He was thereupon permitted to remain.

When the Amalgamated was organized, Akers became secretary. He was perhaps its most active and aggressive organizer, and the management knew of at least some of his activities.

Albert Smith, a witness for the Board, testified that on about August 17, 1937, Fleming told him Akers was to be discharged, since he was standing in the way of Fleming's efforts on behalf of some of the men. At about that time Akers complained to W. A. Spuehler;

the respondent's vice president and treasurer, that such a threat had been made.

During the week end prior to September 7 the respondent installed a device which would give a signal in the office whenever Akers' meter ran improperly. Jeff Westover, the plant superintendent's son, testified that on the night of September 7 the signal indicated that Akers' meter was running by irregular means, and he went quickly to Akers' welding booth and watched him. He testified he looked inside the meter while Akers was working and saw a small wooden plug there which caused a continuous flow of electricity through the meter whether Akers was welding or not. After about 10 minutes Akers, who had complained earlier of not feeling well, left the booth and changed his clothes to go home. His foreman then told him he was discharged for cheating. At the hearing Akers denied that he caused his meter to run improperly that night. However he admitted that he had done so on other occasions, and he said, in reference to the practice, "Nothing is wrong if you don't get caught." He also admitted not denying the accusation made against him when he was discharged. We are compelled to conclude that Akers was guilty of the offense for which the respondent claims he was discharged.

The foreman knew that many, if not all, the welders ran their meters improperly by one means or another, and after Akers was discharged the respondent put locks on them to prevent tampering. Akers was one of the best welders in the plant, but he was the only one on whose meter the signal device was installed. It was testified at the hearing that materials were available to install the device on only one meter, and the respondent claimed that Akers' was selected because his production record indicated his meter was running improperly to an outstanding extent. However, no evidence was introduced to support this claim. The record creates a suspicion that the respondent, having determined to discharge Akers because of his union activities, used as a pretext his resort to a practice which the respondent knew was general throughout the department. Nevertheless, we do not think the record supports a finding to that effect. Akers had been discharged in February for similar conduct, and only a few days before the discharge referred to in the complaint he had been warned by his foreman against the practice. Under the circumstances his conduct clearly laid him open to the disciplinary action taken by the respondent.

The record affords insufficient basis upon which to sustain the charge that Akers was discriminated against because he joined or assisted the Amalgamated, or because he engaged in concerted activities with other employees.

Since we have found that the several charges of discrimination are not sustained we will dismiss the portions of the complaint alleging that the respondent, by discharging certain employees, discriminated in regard to hire and tenure of employment and discouraged membership in the Amalgamated, thereby engaging in unfair labor practices within the meaning of Section 8 (1) and (3), of the Act.

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

We find that the activities of the respondent set forth in Section III A and B, above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### THE REMEDY

Since the respondent has unlawfully sponsored, dominated, and supported the Foundry Workers, that organization cannot operate as a true representative of the employees, and we shall order it disestablished. We shall also direct the respondent to cease to give effect to its contract with the Foundry Workers.

Since a majority of the respondent's employees within an appropriate unit designated the Amalgamated as their bargaining agent, we shall order the respondent to bargain collectively with that organization upon request. The Foundry Workers claims that from June 23 on it represented a majority of the employees, but that fact, if true, is immaterial. The Foundry Workers, having been assisted by the respondent's unfair labor practices, was not the employees' freely chosen bargaining agent. To effectuate the policies of the Act, the Board will disregard the effect of the unfair labor practices, and, as nearly as possible, will restore the status previously existing by making an order based upon the majority prevailing on the date of the refusal to bargain.

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

#### CONCLUSIONS OF LAW

1. Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1719, and the Union of Foundry Workers, are labor organizations, within the meaning of Section 2 (5), of the Act.

2. The hourly paid production and maintenance employees of the respondent, excluding watchmen, janitors, clerical and office employees, foremen, subforemen, and other supervisory employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1719, was on June 14, 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.

4. By refusing to bargain collectively with Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1719, as the exclusive representative of the employees in the above-stated unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5), of the Act.

5. The respondent, by dominating and interfering with the formation and administration of the Union of Foundry Workers, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (2), of the Act.

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

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

8. The respondent has not engaged in unfair labor practices, within the meaning of Section 8 (3), of the Act.

#### ORDER

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

1. Cease and desist from:

(a) Refusing to bargain collectively with Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1719, as the exclusive representative of the respondent's hourly paid production and maintenance employees, excluding watchmen, janitors, clerical and office employees, foremen, subforemen, and other supervisory employees;

(b) Dominating or interfering with the administration of the Union of Foundry Workers, or with the formation or administration of any other labor organization of its employees, and from contributing support to the Union of Foundry Workers or to any other labor organization of its employees;

(c) Giving effect to its contract with the Union of Foundry Workers;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, and assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining and other mutual aid and 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) Upon request, bargain collectively with Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1719, as the exclusive representative of the respondent's hourly paid production and maintenance employees, excluding watchmen, janitors, clerical and office employees, foremen, subforemen, and other supervisory employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Withdraw all recognition from the Union of Foundry Workers as representative of any of its employees for the purposes of dealing with it with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, and completely disestablish the Union of Foundry Workers as such representative;

(c) Immediately post, and keep posted for a period of at least thirty (30) consecutive days from the date of posting, in conspicuous places throughout its plant, notices to its employees, stating (1) that the respondent will cease and desist as aforesaid; (2) that the respondent will, upon request, bargain with Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1719, as the representative of its hourly paid production and maintenance employees, excluding watchmen, janitors, clerical and office employees, foremen, subforemen, and other supervisory employees, with respect to grievances, labor disputes, rates of pay, wages, hours of employment, and other conditions of employment; (3) that the respondent's employees are free to join and assist any labor organization for the purposes of collective bargaining with the respondent; (4) that a person need not become a member of the Union of Foundry Workers in order to secure or retain employment with the respondent; and (5) that the respondent has withdrawn all recognition of the Union of

Foundry Workers as the representative of any of its employees for the purposes of dealing with it with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, that the Union of Foundry Workers is disestablished as such representative, and that the respondent's agreement with the Union of Foundry Workers is void and of no effect;

(d) Notify the Regional Director for the Thirteenth Region in writing within fifteen (15) days from the date of this order what steps the respondent has taken to comply therewith.

And it is further ordered that the complaint be, and it hereby is, dismissed in so far as it alleges that the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3), of the Act, and in so far as it alleges that the respondent by discharging certain employees has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1), of the Act.