

In the Matter of HARLAN FUEL COMPANY and UNITED MINE WORKERS
OF AMERICA, DISTRICT 19

Case No. C-489.—Decided July 5, 1938

Coal Mining Industry—Interference, Restraint, and Coercion: antiunion statements; circulation of petitions to be used as basis of request for gubernatorial intervention in organizational activities of "outside" union; interference with organizational activities and meetings; threats of bodily harm to union organizers; expressed opposition to labor organization; ejection of organizers from company town: right of employees to receive aid, advice, and information from others concerning rights guaranteed by the Act; employer ordered to cease interfering with right of representatives of labor organizations to enter town—*Company-Dominated Union:* domination of and interference with formation and administration; support; circulation of petitions for formation of, during working hours, by foremen, in violation of mine rule, with tacit assent of supervisory employees and officials; coercion to join; discrimination in favor of, in endorsement and recognition as representative of employees; discrimination in favor of members of; application of, for certification as representative, dismissed; dis-established, as agency for collective bargaining—*Contract:* employer ordered to cease giving effect to any contract it has or may have entered into with organization found to be company-dominated—*Discrimination:* as to tenure of employment: discharges, for union membership and activity; closing sections of mine and discontinuing shifts, as adaptation of lock-out technique; transfer to work entailing peril to life, held to constitute discharge; transfer of employee from only work within his physical ability, held to constitute discharge; as to terms and conditions of employment: for union membership and activity; transfers from hourly paid work to coal loading under adverse conditions; transfer of coal loaders to poor working places; "doubling up" employees; failure to cut and shoot coal, preparatory to loading; furnishing insufficient cars for loading; charges of, dismissed as to 11 persons—*Reinstatement Ordered:* transferred employees and discharged employees, dismissing newly hired employees, if necessary—*Back Pay:* awarded; discharged employees; employees discriminated against as to conditions of employment as coal loaders, for losses of production on tonnage basis.

Mr. Leonard Shore and Mr. Charles M. Ryan, for the Board.

Mr. Cleon K. Calvert and Mr. William Sampson, of Pineville, Ky., for the respondent.

Mr. Gus B. Bruner, of Harlan, Ky., for the Association.

Mr. James S. Golden, of Pineville, Ky., for the Union.

Mr. David Y. Campbell, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges and supplemental charges duly filed by United Mine Workers of America, District 19, herein called the Union, the National Labor Relations Board, herein called the Board, by Philip G. Phillips, Regional Director for the Ninth Region (Cincinnati, Ohio), issued a complaint dated October 1, 1937, against Harlan Fuel Company, Yancey, Kentucky, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon the respondent, upon the Union, and upon Yancey Workmen Association, Inc., herein called the Association. On October 4, 1937, the respondent filed an answer. The Association filed its answer at the hearing. Likewise at the hearing, the complaint, charge, and answer of the respondent were each respectively amended.

The complaint, as amended, alleged in substance, so far as here material, (a) that on various dates during February, April, May, June, and September, 1937, the respondent discharged certain named employees,¹ 36 in number, for the reason that they joined and assisted the Union, thereby discriminating in regard to the tenure of employment of these persons and discouraging membership in the Union; (b) that the respondent assigned 24 others of its employees² to dangerous working places, laid them off for periods of time when work was available, gave 2 or more of said employees working rooms which would accommodate only 1 person, and, in sundry other ways, prevented said employees from earning as much as they would have earned under normal working conditions, for the reason that they,

¹ The names of these employees are as follows: Oley Bates, E J. Bowling, Walter Bowling, Dewey Brock, J. L. Cooper, Lee Cornett, Sam Dice, Ira Dodd, Clarence Douglas, Cecil Dozier, Leonard Dozier, Albert Goins, C. C. Gibson, J. T. Latham, Hayes Lewis, John Henry Lewis, Charley Lasley, Lumus Lundy, E M Mason, Charles Osborne, Chester Perkins, Elmer Perkins, O M Perkins, Wells Richardson, Earl Shakelforth, Monzo Shepherd, Homer Slover, Fate Smith, Clifford Smithers, Blane Stephens, Johnston Sweeney, Walter Thomas, Ray Walters, Albert Young, Arthur Young, and Nap Young.

² The names of these employees are as follows: Edgar Baird, Cecil Boyd, Leonard Boswell, Roy Brannin, Jack Calvin, Evan Davenport, David Davis, Fred Day, Ernest Flucker, Preston Garner, Henry Gaston, Millard Harness, Charlie Hicks, Grover Hicks, Ned James, Henry Lasley, Tom McIntyre, O L. Nelson, Nead Patterson, Murphy Pierce, Leslie Smithers, Ben Stevens, George Washington, and James Wilburn.

too, joined and assisted the Union, thereby discriminating in regard to the hire and tenure of employment and condition of employment of said persons and discouraging membership in the Union; (c) that the respondent formed, and dominated and interfered with the administration of a labor organization of the employees known as Yancey Employees Association,³ and contributed support to it; (d) that by the afore-mentioned acts and each of them, and in many other devious ways, the respondent has interfered with, restrained, and coerced its employees, and now is so interfering with, restraining, and coercing them, in the exercise of the rights guaranteed in Section 7 of the Act.

The respondent, by its answer, as amended, objected to the jurisdiction of the Board over the subject matter on the ground that the respondent's business was not in, nor did it affect, interstate commerce. It denied, in general, the material averments of the complaint, as amended. It alleged, among other things, that it had entered into a contract with the Association respecting hours, wages, and working conditions of its employees, and providing for a check-off. The Association in its answer denied the averments of the complaint, as amended, in so far as they related to it, and petitioned the Board for certification of itself as the duly authorized representative of the respondent's employees for purposes of collective bargaining.

Pursuant to notice, a hearing was held on October 11, 12, 13, 14, 15, and 16, 1937, at Harlan, Kentucky, before James G. Ewell, the Trial Examiner duly designated by the Board. The Board, the respondent, the Union, and the Association were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues was afforded all parties. During the course of the hearing, counsel for the Board moved to dismiss the allegations of the complaint, as amended, with respect to J. L. Cooper and 24 other persons therein named,⁴ for the reason that they had failed to appear at the hearing although duly notified thereof. This motion was allowed by the Trial Examiner. The Trial Examiner made various rulings on other motions of the parties, and on objections to the admission of evidence. The Board has reviewed said above-mentioned rulings of the Trial Examiner and finds that no prejudicial errors were committed. Said rulings are hereby affirmed.

On March 19, 1938, the Trial Examiner made his Intermediate Report, which was filed with the Regional Director and duly served

³ The correct name of this organization is Yancey Workmen Association, Inc

⁴ The persons so named were E. J. Bowling, Walter Bowling, Cecil Boyd, Dewey Brock, Evan Davenport, Sam Dice, Ira Dodd, Clarence Douglas, Cecil Dozier, Leonard Dozier, Preston Garner, Henry Gaston, Millard Harness, Grover Hicks, Charley Lasley, Hayes Lewis, John Henry Lewis, Wells Richardson, Monzo Shepherd, Fate Smith, Ben Stevens, Walter Thomas, George Washington, and Nap Young

upon all the parties, finding that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the Act and recommending that the respondent cease and desist from its unfair labor practices; reinstate, with back pay, certain of its employees⁵ found to have been discriminatorily laid off or discharged by the respondent; make whole certain other of the employees⁶ found to have been discriminated against in regard to conditions of employment, for any loss in pay suffered by reason of such discrimination; withdraw all recognition from and disestablish the Association as an agency for collective bargaining with the respondent; and take certain other appropriate action to remedy the situation brought about by the respondent's unfair labor practices. The Trial Examiner also recommended that the complaint, as amended, be dismissed as to certain employees⁷ whom the Examiner found not to have been discriminated against.

On March 31 the respondent filed its exceptions to the Intermediate Report. On April 18 it filed amended exceptions. The Association filed no exceptions to the Intermediate Report, but has submitted a brief in support of its position. The parties, although accorded an opportunity for oral argument before the Board, made no request therefor. We have carefully considered the respondent's exceptions and amended exceptions to the Intermediate Report, and in so far as they are inconsistent with the findings, conclusions, and order below, find them to be without merit.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent is a Kentucky corporation engaged in the business of mining and selling bituminous coal. Its principal place of business is located at Yancey, Harlan County, Kentucky. The respondent employs 500 or more persons.

Yancey is what is commonly termed a "company town." All its property is held, and to that extent its civic life controlled, by the

⁵ The names of these employees are: Lee Cornett, Fred Day, Albert Goins, Charles Gibson, J. Latham, E. Mason, Nead Patterson, Chester Perkins, O. Perkins, Homer Slover, Clifford Smithers, Leslie Smithers, Blane Stephens, Ray Walters, Albert Young, Arthur Young.

⁶ The names of these employees are: Edgar Baird, Roy Brannin, Ernest Flucker, Ned James, Tom McIntyre, Elmer Perkins, Murphy Pierce, Johnston Sweeney, James Wilburn

⁷ The names of these employees are: Oley Bates, Leonard Boswell, Jack Calvin, David Davis, Charles Hicks, Henry Lasley, Lumus Lundy, O. L. Nelson, Charles Osborne, Earl Shakelforth.

respondent. Its inhabitants are employed by the respondent in the adjacent mining property. About 5,000 acres of uninclosed land, comprising in part the mine and town site, together with all improvements appurtenant thereto, are under lease to the respondent, as lessee, for a term of 99 years. The improvements include the mine property, with its mines, tipple, other buildings, constructions, and equipment; and the town proper. Yancey has 250 dwelling houses; a commissary building containing offices, a general retail store; and a United States Post Office; other buildings and structures; paths, roads, streets, and ways. All of this is company property. The mine and town, together form one connected plant, plan, and enterprise. Surrounding both is a belt of apparently unimproved land, likewise under lease to the respondent, traversed at one place by a paved road which the respondent constructed, leading to Gulston, Kentucky. The road constitutes the regular means of ingress and egress to and from Yancey.

The mine has a daily capacity of 3,000 tons, and an annual output of about 500,000 tons. The dollar volume of the respondent's sales is not shown, but the market value of the coal at the time of the hearing was \$1.80 per ton. Ninety per cent of the coal mined is shipped outside the State of Kentucky. During the month of September 1937, a representative month, shipments were made from the mine to points in the States of North Carolina, South Carolina, Illinois, Georgia, Tennessee, Alabama, Indiana, Michigan, Ohio, and Iowa.

The respondent sells its coal to sales agencies, located in Detroit, Michigan; Atlanta, Georgia; and Chicago, Illinois. Some coal is also regularly sold to purchasers by Elzo Guthrie, the respondent's president. All coal is sold f. o. b. the tipple, according to railroad weights, and settlements are made monthly on the basis of market price less 8 per cent. Orders are filled by loading coal from the respondent's mine tracks into railroad cars of the Louisville and Nashville Railroad for transport to the consignees.

II. THE ORGANIZATIONS INVOLVED

United Mine Workers of America, District 19, is a labor organization affiliated with the Committee for Industrial Organization. It admits to membership all employees of the respondent, except supervisory, office, and clerical employees.

Yancey Workmen Association, Inc., is a labor organization, admitting to membership all employees of the respondent, except supervisory and clerical employees.

III. THE UNFAIR LABOR PRACTICES

A. *Interference, restraint, and coercion*

The Union first began organization of the respondent's employees about January 1937. Its principal membership campaign was launched sometime in April.

In January or February the respondent had its general foreman, Sharp, and other foremen circulate petitions among the employees, for their signatures, stating that the employees were satisfied with working conditions at the mine. It was proposed by the respondent to use the petitions when signed in making a request of the Governor of the State to prohibit "outside" organizers from entering Harlan County. Clyde Guthrie, vice president of the respondent, testified that "there was a request on that [the Governor] . . . protect this whole coal field from outside agitation by the United Mine Workers." However, the evidence fails to show the existence of any cause or ground for such intervention, and the record as a whole yields a strong inference that the sole purpose of the request was to enlist the aid of public authority to defeat organizational activity.⁸

On April 29 a number of the Union's organizers were in Yancey talking from a sound truck about the Union to gatherings of the respondent's employees. While one of them was speaking the whistle in the respondent's power plant commenced to blow and continued blowing for about 20 to 30 minutes, effectively rendering the speaker's words inaudible. At the hearing the respondent's officers admitted having heard the whistle but disclaimed knowledge of the reason therefor, and offered no explanation for their failure to investigate the occurrence.

On May 22 several of the organizers, while in Yancey, went to the commissary and purchased some "coca-colas." While they were at the soda fountain, Clyde Guthrie came in, ordered them out of the commissary and off the respondent's property, saying, "Get your coca-cola drunk, and get the hell out of here."

On July 10 some of the organizers were in the post office at Yancey posting letters and making inquiry about general-delivery mail. While they were thus occupied, an unidentified person signaled their presence to an individual outside the building. Thereupon, Elzo Guthrie, president of the respondent, and several other persons, each with his hand on his pistol, entered the building and surrounded Hurd, a colored organizer. Guthrie said to Hurd, "What the hell are you doing in here?" Upon Hurd's reply that he had business at the

⁸ It is of interest to note that Kentucky Acts of 1934, C. 51, Sec. 21, makes the following provision, subject to penalty of fine and imprisonment for any violation thereof: "No officer or member of the Active Militia shall at any time, or under any circumstances whatsoever, participate in any labor or industrial controversy on either side thereof . . ."

post office, Guthrie said, "Get the hell out of here, you black son of a bitch there, and get your mail. I ought to shoot your . . . damn black brains out." Hurd left the building, followed by Guthrie. Guthrie observed Green, another organizer, standing near, and said, "What the hell are you doing here?" With his hand still on his gun, Guthrie then ordered all the organizers to leave the property.

In the light of the foregoing occurrences and the record, we are satisfied that coincident with the coming of the Union organizers to Yancey for the purpose of enlisting members among the mine employees, the respondent through its officers and agents determined to combat such activity. The respondent's circulation among its employees of the petitions, its blowing of the whistle, its exhibition of hostility and violence toward the organizers, and the marked contrast⁹ between such treatment and that accorded the Association's organizers, hereinafter set forth, all were intended by the respondent, and had the necessary effect, to intimidate, restrain, and coerce its employees in their right to join a labor organization of their own choosing, and in other rights guaranteed by the Act.

Of wider significance, perhaps, the above-mentioned events serve to bring to the fore an issue which in past years has proved a troublesome cause of serious industrial disturbances. The record clearly establishes that the respondent was resolved to keep the organizers out of Yancey.¹⁰ It sought gubernatorial intervention. It threatened the lives of the organizers with show of great force. The respondent urges in justification of its exclusion of the Union organizers, that its property interests in the land where Yancey is situated, and in all improvements appurtenant thereto, entitled it to prohibit the organizers from entering Yancey and forcefully to remove them as trespassers. The respondent also contends that it extended to the organizers a license to traverse the town, but the organizers abused their license and consequently properly were prohibited from entering it and were ejected as trespassers.

The evidence shows that substantially all of the dwellings located in Yancey are occupied by employees of the respondent. These houses are leased by the respondent, as landlord, to the employees, as tenants. The premises so demised are, as heretofore mentioned, completely surrounded by other lands in which the respondent has its property interest, and access to any of the houses necessarily can be

⁹ Cf. *Matter of Wallace Manufacturing Company, Inc. and Local No. 2237, United Textile Workers of America*, 2 N. L. R. B. 1081; *National Labor Relations Board v. Wallace Manufacturing Company, Inc.*, Fourth Cir. 95 F. (2d) 818; *Mtter of Ballston-Stillwater Knitting Co., Inc. and Textile Workers Organizing Committee*, 6 N. L. R. B. 470

¹⁰ A description of parallel action by the Harlan County Coal Operators' Association, of which the respondent was a member, may be found in the decision of the Board, *Matter of Clover Fork Coal Company and District 19, United Mine Workers of America*, 4 N. L. R. B. 202; *Clover Fork Coal Company v. National Labor Relations Board*, 6th Cir., decided, June 8, 1938, 97 F. (2d) 331.

had only over such other lands. The respondent maintains for purposes of ingress and egress to the homes of its tenants, various private and customary ways, roads, streets, and paths traversing Yancey and the adjacent land.

It is established doctrine in such cases that rights of ingress and egress over the private and customary ways, roads, streets, and paths, essential to the enjoyment of the demised premises, pass to the tenant as annexed to his leasehold; and the use of such rights free from interference by the landlord is not limited to the tenant but extends to all third persons visiting the tenant under express or implied invitation for any lawful purpose. Persons transacting matters of interest with tenants in company towns have a right to use the private ways in doing so.

In entering and passing through Yancey on their visits to the employees there residing, the Union organizers were engaged in a transaction of mutual interest, the exercise by the employees of their right under the Act to form and join a labor organization for the purpose of collective bargaining and other mutual aid and protection. The use made by the organizers of the customary passways, roads, and streets to reach the employees was accorded by law and could not be defeated through the simple assertion by the respondent of a landlord's interest.¹¹ By forcibly preventing the organizers from coming to or remaining in Yancey, the respondent not only violated this right but engaged in an unfair labor practice. Interference by an employer with the lawful conduct of organizational activities among employees by labor organizers is in derogation of rights secured employees under Section 7 of the Act; and constituted an unfair labor practice within the meaning of Section 8 (1). The rights guaranteed to employees by the Act include full freedom to receive aid, advice, and information from others; concerning those rights and their enjoyment.¹²

The respondent also contends, as above stated, that it ejected the organizers from Yancey because they abused a license it had granted them to visit the employees at their homes. The normal right of use in the organizers, however, did not arise from nor depend upon such license. The claimed abuse consisted in alleged solicitation of employees in the mine proper, and in insulting a clerk in the commissary. The evidence does not support this claim.

¹¹ Whether, as has been argued with considerable weight, the organizers also had a right of ingress and egress, under the Act, need not be determined. Also compare, *Matter of Waterman Steamship Corporation and National Maritime Union of America, Engine Division, Mobile Branch, Mobile, Alabama*, 7 N. L. R. B. 237; *Matter of Alabama Mills, Inc. and Local No. 2051, United Textile Workers of America*, 2 N. L. R. B. 20.

¹² Cong. Rec., May 16, 1935, v. 79, No. 102, pp. 7948-7960, 7967-7970; H. R. Report No. 1147, 74th Cong., 1st Sess., p. 16: Cf. *Matter of Ralph A. Freundlich, Inc., etc. and Max Marcus et al.*, 2 N. L. R. B. 802; *Matter of Protective Motor Service Company, a Corporation and Twenty-Five Employees*, 1 N. L. R. B. 639.

We find that the respondent by its foregoing acts has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

B. Domination of and interference with the formation and administration of the Association

About April 1, 1937, there were circulated at the respondent's mine among its employees certain petitions setting forth the following:

We, the members of the Yancey Workmen Association, hereby choose unanimously for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, the following:

O. M. Lowery, President
 Jess Daniels, Chairman
 Ham Hatmaker, Representative
 Claud Braden, Representative
 Judson Bearden, Representative
 Albert Adams, Representative
 F. G. Posey, Representative
 Bill Qualls, Representative
 J. C. Hannah, Representative

At the time that the circulation was begun there was in existence no organization known as Yancey Workmen Association. The circulation, itself, was the first step in the formation of the Association. Various persons who assisted in the circulation, called to the hearing as witnesses for the Association, did not know who had prepared the petitions or what was the source of their origin.

The petitions were circulated during working hours by several employees later prominent in the affairs of the Association, and by foremen. Signatures to the petitions were expressly solicited. A rule of the respondent requires that its workers remain at their places when on duty and prohibits them from going elsewhere in the mine. Although this rule was violated in the circulation of the petitions, no action was taken by the respondent to prevent the circulation nor was anyone ever disciplined therefor. At the hearing the respondent's officers and foremen disclaimed having witnessed any circulation. The record permits of no doubt, however, that the respondent's supervisory force well knew of the circulation of the petitions at the time it occurred. In one case, Kitts, an employee, later president of the Association, solicited another employee in the presence of the general foreman, Sharp. Moreover, as above stated, the foremen themselves participated in the activity. Collier, one of the foremen, was

particularly aggressive. He not only solicited signatures to the petition but told the employees that the petition was for "the company-protected union," and if 51 per cent of the employees signed, the Union could be kept out, that the respondent was proposing to put loading machines in the mines and only those who signed the petition would be offered an opportunity to work, that the others would have no jobs. At the hearing, Collier denied the occurrence. His testimony, however, is neither clear nor convincing, and we can accord it no credence.

According to claim made at the hearing by the Association, some 400 of the respondent's employees signed the petitions. At least one of the signatures is shown to have been a forgery. Some of the employees had no opportunity to read the petitions at the time they were solicited, and signed upon being told it was for "the company-protected union." Davenport, an employee called as a witness by the respondent, described his becoming a member of the Association thereafter formed, and the part played therein by his foreman, Hamilton, and the petitions, as follows:

Q. How did you happen to get the [Association membership] card through the mail?

A. I don't know. I signed a paper in number two.¹³

Q. Who brought you the paper?

A. Mr. J. B. Hamilton.

Q. Is he still boss up there?

A. Yes, sir.

Q. Gave you that paper to sign, didn't he?

A. Yes, sir.

Q. After he got that paper signed, you became a member of Yancey Workmen's Association?

A. Yes, sir.

Q. Well, do you know what the Yancey Workmen's Association is?

A. No.

Q. Don't know anything about that?

A. No.

Q. And you never signed anything to become a member of that Association?

A. Not unless that paper was it.

On May 22 the Association held an organizational mass meeting for the employees at the gymnasium in Yancey. Notices of the meeting appeared on a bulletin board regularly used by the respondent for posting work notices and official announcements.

¹³ This refers to the respondent's Mine No 2

In early June the Association filed articles of incorporation, and on June 7 was certified by the Secretary of State as a corporation. A photostatic copy of the certificate was posted on the bulletin board. The articles of the Association provided for an election of officers and a board of representatives to be held on June 12, 1937. No election was held on that date or at any time subsequent. At the hearing the Association claimed that its officers and representatives had previously been elected by popular vote at the May 22 mass meeting. The testimony, however, of various persons who attended the meeting leaves serious doubt as to the occurrence at that time of such election.

On June 15 the Association asked the respondent to recognize it as the exclusive representative of all the employees for purposes of collective bargaining. In support of its claim that it represented a majority of the employees, the Association submitted the signed petitions which had been circulated about April 1 by the Association organizers and foremen. On June 20 the respondent accorded the Association recognition as exclusive bargaining agent.

At the same time that recognition was obtained, the Association submitted to the respondent a proposed form of contract. The subject matter thereof is not clear from the record. Neither the Association nor the respondent introduced in evidence a copy of the contract. Thereafter, some negotiations were had by an Association committee and the respondent. Although the answer of the respondent alleges the existence of a contract between itself and the Association covering terms and conditions of employment, officers of the Association denied at the hearing the making of such contract, and we cannot find that any was entered into. The Association never requested the respondent to increase wages, shorten hours, or provide a check weighman, three of the common subjects treated in labor contracts in the coal mining industry. The Association did secure from the respondent an undertaking to check off Association dues; to pay for certain "dead work," such payment, however, not to come from the respondent but out of the earnings of the machinemen; and, as landlord, to set aside a rent increase, put into effect a short time before.

On June 22 the board of representatives of the Association adopted bylaws for the organization. The bylaws were never submitted to or ratified by the membership. Among other things, they provide that only regular employees of the respondent may be officers and that the officers shall be elected by the board. The conduct of the business of the Association is vested in the officers and board. The divorcement thus achieved of the administration of Association affairs from control by popular vote of the membership has resulted in an ignorance by members concerning fundamental facts of the

Association. Substantially all the Association members called as witnesses by the respondent were unable to state whether or not the Association had bylaws, whether or not there was a grievance committee, whether or not the Association had a contract with the respondent; and were unable to name the officers of the Association or their respective representatives.

Throughout the period under review, employees of the respondent who became members of the Union were discriminated against in regard to their tenure and condition of employment because of their organizational affiliation and activities.¹⁴ Some were discharged; others assigned to poor working places in the mine. No such penalty because of membership or organizational activity was meted out to Association members. Some Union members were discharged for not joining the Association. In one instance a Union member was transferred from his job on the tipple, and the secretary-treasurer of the Association given his place. The tipple job in question was at a strategic point passed daily by practically all employees leaving the mine.

The use of the respondent's bulletin board, as already indicated, was freely made available to the Association. At the hearing the respondent contended that the bulletin board was for a public use, over which it had no control. In the light of the record, especially the position taken by the respondent in connection with the presence of the Union organizers in Yancey, we entertain little doubt that the respondent had and has full control over the use of the board in such matters. While the Union made no request for use of the board, it is clear that any such request would have been futile. On July 16 the Association posted a notice on the board stating that "Every man employed by Harlan Fuel Co., Yancey, Kentucky, must sign a membership card in the Yancey Workmen Association, Inc."

Upon the foregoing facts and the record, we are convinced that the Association is not the free representative of the respondent's employees, which the Act contemplates. Its formation and affairs have been dominated and interfered with, throughout by the respondent. It is the creature of the respondent who has supported it. Its existence can be viewed only as part of the broader plan of the respondent to defeat the Union and stifle self-organization among the respondent's employees.¹⁵

From the outset the respondent, through its officers and supervisory force, was determined to have its employees become members

¹⁴ See Section III C, *infra*.

¹⁵ Cf. *National Labor Relations Board v. Wallace Manufacturing Company, Inc.*, 4th Cir 95 F. (2d) 818; *Matter of Wallace Manufacturing Company, Inc. and Local 2237, United Textile Workers of America*, 2 N L R. B. 1081; *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, *et al.*, 58 S. Ct. 577.

of the Association. This was clear from the circulation of the petitions on the respondent's time, with the assistance of its foremen, and in violation of its own rule forbidding travel about the mine. Any desire for expression the employees may have had with respect to the formation of the Association was effectively thwarted not only by the manner of the circulation and the threats of foremen, but by the language of the petition itself which assumed the existence of the Association and named the representatives.

The record establishes, and what has been set forth above shows, that throughout the period under review the respondent never ceased in its support of the Association. It assisted the Association's organizers, discharged employees who would not join the Association, and awarded favorable working places to those who did. It lent further assistance in distinguishing sharply in treatment accorded the Union. Whereas the Association held its mass meeting without interference by the respondent, and was permitted the use of the bulletin board for its notices and organizational literature, the Union was stopped by force in its activities, had its organizers ejected from the town, and had its members discriminated against in their tenure and conditions of employment.

Events as they occurred point to the end sought by the respondent. An organization, dominated in its formation, with separation of direction from popular control assuring continued servieny, came into being to receive from the respondent exclusive recognition as representative of the employees for purposes of collective bargaining. It is noteworthy that recognition was based not upon any membership roll taken by the Association after incorporation, but upon the signatures of the April 1 petitions which, among other things above mentioned, had been obtained through aid of the foremen. In its dealings with the respondent, the Association hardly has functioned as a bargaining agency. It has made no requests of substance; it has been given no concessions of substance; and so far as the record discloses, it has secured no contract from the respondent relating to wages and hours of employment.

We find that the respondent has dominated and interfered with the formation and administration of the Association, and has contributed support to it; that it thereby has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

C. The discharges

Charles Gibson and *J. Latham* were discharged by the respondent on April 27, 1937. Both men were members of the Union. During the Union membership drive, above-mentioned, which commenced

shortly before the discharge, Gibson and Latham proved very active in soliciting fellow workers to join. They succeeded in securing as members all of the employees on their shift. The circulation of the April 1 petitions and the formation of the Association are not shown to have caused them to lessen or cease in any manner their efforts on behalf of the Union. That their affiliation and union activities were known to the respondent we have no doubt. Denials by witnesses of the respondent that the respondent had any awareness thereof are unconvincing.

The section of the mine where Gibson and Latham worked was closed on the night of April 26. Upon reporting for work the following day, Latham was told by the foreman, Lovett, of the discontinuance of the shift and to see Sharp, the general foreman, about being assigned other work. It is the usual and customary practice at the mine to assign employees whose section has been closed or shift discontinued to other work either in the same or a different classification. Gibson was a motorman, Latham a coupler. Motormen, couplers, and other employees paid on an hourly or salary basis are generally the oldest workers in point of service, with experience at various jobs. The record shows that there is a considerable amount of change in job and classification among the respondent's employees.

Latham went to see Sharp, in company with Lovett. Lovett told Sharp that he thought Latham would be all right. Sharp replied, "Hell, no, he is too strong a Union man. I can't use him." While Sharp denied at the hearing having so said, the general circumstances surrounding the discharge show little credence can be accorded Sharp's testimony. Gibson did nothing at the time and waited several days before asking Sharp for other work. Gibson then made the request and was told that there was no job for him. Gibson asked for a recommendation to obtain work elsewhere. Some days later Sharp gave him one, after first securing authority to do so from Charles Guthrie, an official of the respondent. In authorizing the recommendation, Guthrie said to Gibson, who was present, "Be damn sure you don't bother me any more. Don't be fooling with my men or trying to sign any of them up."

The respondent contends that it discharged Gibson and Latham because the section of the mine where they worked shut down. It is asserted that a want of current demand for the grade and size of coal there mined occasioned the shut-down. The record shows, however, that although the section was closed on April 26, it reopened later and since has been worked; that the three other motor crews who worked there, consisting of a motorman and coupler each, apart from the Gibson-Latham crew, were returned to work; that all other employees in the closed section likewise have been put back to work; that

shortly after April 26, new employees were hired for jobs as motor-men and couplers.

There can be but one finding. The respondent discharged Gibson and Latham on April 27, refused them other employment, and failed to reinstate them upon the opening of the section where they worked, because of their union affiliation and activities. We are of the opinion that the closing of the section was merely an adaptation by the respondent of the familiar lock-out technique, utilized in this instance to rid itself of two Union members whose activities threatened the respondent's own plans concerning organization of its employees. The hostile words of Sharp and Guthrie, the failure to follow the usual practice in assigning other work where a shut-down of a section has occurred, the obvious contrast in treatment between that accorded the two men and the others with whom they worked, confirm the conclusion reached.

At the time of the discharge, Gibson was paid as wages \$5.75 per shift; Latham \$5.60. Since then, Gibson has earned under \$300. Latham's earnings are not shown.

Blane Stephens was employed as a coal loader by the respondent about 4 years. He joined the Union in April 1937. On or about May 2, some 5 days after the discharge of Gibson and Latham, Stephens was discharged by his foreman, York.

Stephens testified that York came to the place where Stephens was working without stopping at any of the other working places in the section, and said, "I have got to fire you"; that York gave no reason therefor; that Stephens, assuming he was being discharged because of his membership and activities in the Union, made no protest but in reply stated that some of his tools were elsewhere in the mine, inferring that he first would have to get them; that York then said, "Anyhow, you got to go on out."

York was called as a witness by the respondent. He testified that he went into Stephens' working place as a matter of mine inspection; that he found the roof in bad condition and the place poorly timbered; that he and Stephens then jointly proceeded to measure the distance from the nearest timber to the working face and found it to be 31 feet; that there was only one timber in the place and it was set crooked; that thereupon he discharged Stephens for failure to maintain his timbering. On cross-examination, York admitted that he had been in Stephens' working place 2 or 3 days before and had not observed that the timbering was bad.

The respondent also called as a witness one Pace, an employee loading coal in Stephens' working place. Pace testified that he was off work for 11 days; that at the time he left, the working place was timbered to within 6 feet of the face; that on his return to work, he

found the place was not properly timbered. Pace's testimony fails to fix what time relationship, if any, his period away from work and return, had to the date of Stephens' dismissal.

Stephens specifically denied at the hearing York's version of the discharge. He testified that his working place had been properly timbered. The record does not show that Stephens, during the entire course of his employment, ever failed to set his timbers in accordance with mine rules, or that he ever was reprimanded or warned for so failing. The respondent does not claim it gave Stephens any opportunity on May 2 to do the timbering it alleges he failed to do, despite his 4 years of competent service. While the respondent urges that vigorous enforcement of its timber regulation moved York to discharge Stephens, it appears that a Kentucky statute of similar purpose requiring daily inspection of safety conditions in working places was not followed by York although it is admitted that that was his duty under the statute.

We have concluded elsewhere below that York is not a credible witness. The part he played was sinister in aim. This, as well as the nature of his testimony above reviewed, the admission on cross-examination, and the circumstances as a whole impel us to accord his testimony no greater weight here. We are satisfied that Stephens was peremptorily discharged without ostensible cause. Such discharge by the respondent of an experienced coal loader, shortly after his becoming a member of the Union, creates a natural suspicion as to the motivation of the respondent's action. When it is noted that the discharge occurred in the midst of a period of Union activities, and counter-activities by the respondent, at a time when, as we find herein, the respondent discharged a number of its employees because of their Union membership and activities, we are compelled to conclude, as Stephens himself understood when his discharge occurred, that he had been discriminated against. Pace's testimony, we feel, is so uncertain as to time and event, and otherwise unsatisfactory, as to be without consequence.

At the time of his discharge, Stephens earned on an average \$100 per month. He has earned nothing since.

Ray Walters, a coal loader, was discharged by Sharp 3 days after the dismissal of Stephens, above-mentioned. Walters also had joined the Union in April. Sharp told Walters that the reason therefor was that Walters had been away from work attending a carnival the preceding Saturday night, May 1, without first having secured the respondent's permission. Walters immediately protested to Sharp that the real reason for the discharge was Walters' refusal to join the Association.

About a week prior to the discharge, Collier, the foreman whose activities have been noted above, approached Walters and his cousin, Ester Walters, while at work and requested them to sign the petition for "the company-protected union." Collier mentioned that those who signed would be given work at the proposed new loading machines and the others would not. Walters refused to sign; Ester Walters did. On the following Saturday night, May 1, 44 of the respondent's employees, including Walters and Ester Walters, laid off work, without permission, to go to the carnival.

The record shows that of the 44 employees who went to the carnival only Walters and one other employee, who likewise had refused to sign the petition, were discharged for having laid off. While it does not clearly appear that all of the others had signed or were members of the Association, the evidence does establish that at least one, Ester Walters, who had signed the petition had not been so disciplined. It has not been the respondent's rule or practice to discharge an employee for absence without leave, but, in proper cases, to lay off the employee for a specified period.¹⁸

The discharge of Walters also occurred during the period of marked activity by the Union and repressive antiunion acts by the respondent. Walters' refusal to sign the petition at Collier's solicitation showed the respondent where he stood. His dismissal, along with one other employee who had not signed the petition, when 42 employees in like position received no such penalty, as well as the departure by the respondent from its accepted mode of discipline, convinces us that the true cause of his discharge was not his Saturday night absence but his refusal to join the Association and give up his membership in the Union.

Lee Cornett joined the Union in early May. On May 21 he was in the office of Sharp, the general manager, looking at the time sheet, when Sharp came in. After sending another employee who was present out of the room and closing the door, Sharp turned to Cornett, saying: "Lee, I understand you are organizing up here on the company's time?" Cornett replied, "Mr. Sharp, absolutely not." Sharp then said "Lee, we are paying you good for your wages here. You work, and we don't want [any] organizing on the company's time." To this Cornett answered, "Mr. Sharp, I am not organizing, but if you are laying at me for belonging to the Union, I sure belong." Sharp in his testimony at the hearing did not deny this conversation.

Three days later, May 24, Cornett was told by his foreman, Fee, that he was being laid off as a trackman, although he could have a job as a coal loader. Cornett had worked as a trackman at the mine

¹⁸ This appears from the testimony of Parsons, Watkins, Pierce, Brannin, and Day.

for almost 2 years. The following day, Cornett went to the working place assigned to him for coal loading, and found that the place was so dangerous as to imperil the life of anyone working there. He then reported the matter to Fee and asked to be assigned another working place. Fee replied that he had none for Cornett. Cornett then left.

The respondent called several witnesses. Fee, the foreman, testified that Cornett was transferred from track work to coal loading for inability to lay switches properly; that Cornett had not been discharged; that he, Fee, knew nothing of Cornett's Union affiliation. Hamilton, Cornett's former foreman, testified that Cornett's services as trackman for the year Cornett worked for him were unsatisfactory. Lowery, a trackman, and one of the organizers of the Association, testified that during the year before the discharge he had to re-lay every switch that Cornett laid. The record raises doubt, however, that Lowery and Cornett worked in the same section together during the year preceding the discharge, and Lowery admitted on cross-examination a general prejudice. Jackson, a motorman, testified that the switches laid by Cornett caused cars to leap the track upon several occasions, and that Lowery had had to re-lay them. On cross-examination he testified that he did not know whether or not Cornett had laid the switches in question. Bargo, a trackman, who allegedly had caused Cornett to be transferred from Hamilton's section to Fee's section for asserted inefficiency, testified that he did not know whether Cornett had laid any switches in Hamilton's section.

We are unable to attach any weight to the foregoing testimony offered by the respondent in support of its claim that Cornett had been transferred to another classification, at work where his life was in grave danger, solely because of inefficiency. The testimony is unpersuasive, often confused, and reflects bias. Cornett had been employed as a trackman for 6 years at other mines before he came to the respondent, and served in that capacity with the respondent for almost 2 years. During the time he was with the respondent no complaints were made to him about his work, and he received the regular wages paid the trackmen. Sweeney, another employee called by the Board, testified that Cornett was a good trackman.

The respondent also sought to show at the hearing that Cornett admitted to one Anderson that the working place assigned Cornett was safe. This evidence we find difficult in believing. Fee, in his testimony, did not deny the hazardous character of the working place he had given Cornett; indeed, the proof is that Fee admitted its dangerous condition to one Grant.

We are of the opinion, and find, that Cornett was transferred by the respondent from his position as trackman to coal loader, and

then assigned an unsafe working place, because of his Union membership and activities; that the claimed inefficiency has not been established, and, apart from that, constituted a mere pretext employed by the respondent to rid itself of another Union member. The conversation between Sharp and Cornett, in which Cornett was accused of organizing during working hours, can only be interpreted, in the light of the record, as an indirect method taken by the respondent to warn Cornett about his remaining a Union member. We feel that Cornett accurately interpreted the conversation when it occurred. In view of Sharp's interrogation about Cornett's activities, Fee's denial of knowledge thereof cannot be accepted. Transferring Cornett to work as a coal loader and then offering him a working place where he could not work without peril to his life, constitutes a discharge, within the meaning of Section 8 (3) of the Act.¹⁷

At the time of his discharge, Cornett earned as trackman \$5.60 per shift, seven shifts per week. Since May 24, 1937, the last day he worked for the respondent, Cornett has earned \$9.

Albert Young, a coal loader, was discharged by York on May 25. When the respondent circulated the first petitions in January or February, heretofore mentioned, intended for use in connection with the request to the Governor to keep the Union organizers out, Young refused to sign. Young joined the Union in April. Three days before his discharge, on May 22, Young attended a gathering of employees at Yancey, assembled to listen to some organizers of the Union. Young actively assisted in the solicitation of members which then occurred. The day happened to be the same one on which the Association was holding its mass meeting above-mentioned.

At the time of his discharge Young was called by York from his place of work and told to "bring his tools out." The expression meant that Young was dismissed. When asked for a reason York replied, "I have plenty of reasons." Young said "I would like you to explain some of them." York answered, "Where were you on Saturday?" Young then said "That was up to me. I had a right to go any place I wanted to." Young also informed York that he was carrying, and evidently intended to continue to do so, application cards for membership in the Union. York thereupon handed Young an order of discharge but refused Young's request to write on it the reason for the discharge. The mine did not operate on May 22. Young's testimony

¹⁷ *Matter of Clover Fork Coal Company and District 19, United Mine Workers of America*, 4 N. L. R. B. 202; *Clover Fork Coal Company v. National Labor Relations Board*, 6th Cir., decided June 7, 1938, 97 F. (2d) 331. Note, under Kentucky Acts of 1934, Extra Session, C. 21, Sec. 42, it was Cornett's statutory duty to refrain from working the place until the unsafe condition was remedied. It is clear that the respondent took no steps to have the working place made safe.

was not denied by the respondent although York was called several times as a witness at the hearing.

We find from the foregoing facts that the respondent discharged Young on May 25 because of his Union activities. Young was then earning an average of \$4.64 per shift, or approximately \$115 to \$120 per month. Since that date he has earned nothing.

O. Perkins and *E. Mason* worked on the tippie. Perkins was discharged by the respondent on June 15; Mason on June 16. Both men were members of the Union. Mason had been in the employ of the respondent for over 16 years.

Three days before his discharge Perkins was told by either Charles or Clyde Guthrie, officials of the respondent, while conversing with them, that his working day was being decreased to 7 hours because "a damn Union man didn't want but seven hours." Perkins was being paid on an hourly basis. On June 15, at the end of the shift he was discharged by Charles Guthrie for allegedly having slept at work earlier in the day.

Charles Guthrie was a witness for the respondent. He testified that on the day of Perkins' discharge, he, Guthrie, and one Patterson, a visitor, passed by the coal crusher where Perkins worked and found him asleep; that he, Guthrie, did not then reprimand Perkins because he did not wish to embarrass the visitor; that he later discharged Perkins.

Perkins testified that he had not been asleep at work when Guthrie and his visitor came to the crusher, that he had observed them come, examine the machinery, and leave.

Mason was discharged by Sharp the following day, likewise for allegedly sleeping at work. Sharp testified that he, accompanied by Joe Guthrie, a brother of the Guthries who were officers of the respondent, went to Mason's station at the crusher and found him asleep; that they thereupon threw pieces of rock and iron on the floor in order to awaken Mason but did not succeed; that at that time a belt on one of the conveyors came off and hit a wall, making a loud noise and awakening Mason; that Sharp then told Mason he could no longer work on the crusher and gave his job to Joe Guthrie, until another employee could be secured to fill it. Sharp further testified that he had found Mason asleep 2 weeks before and had warned him about it. Sharp claimed that Mason had not been discharged but merely removed from the crusher, that Mason himself had quit. The record shows that because of his age and ill health Mason could not work elsewhere in the mine.

Mason denied at the hearing the incident as depicted by Sharp. Mason testified that he had not been asleep when Sharp and Joe Guthrie arrived at the crusher; that some 5 minutes before he had

been engaged in and had completed repairing the machinery which broke down; that Sharp accompanied by Joe Guthrie came to him, accused him of sleeping, discharged him, and put Guthrie in his place. He denied having been given the alleged warning testified to by Sharp. Arthur Young, another witness, stated that on the day in question, as he and his brother were leaving work, Mason called to them to assist him in fixing the crusher; that his brother went to help Mason and he went into the bathhouse; that his brother joined him there some 15 minutes later; that a half hour later he met Mason who told him of the discharge.

The evidence shows that Perkins and Mason are the only employees ever discharged by the respondent for having slept at the tipple. All of the employees working there have slept at one time or another during working hours. Sharp testified on cross-examination that "if a fellow stayed up there long it would make him sleepy." One of the respondent's witnesses, Johnson, testified in response to interrogation by the Trial Examiner, as follows:

Trial Examiner EWELL. You said you had been asleep there yourself?

WITNESS. I have been asleep, yes, sir, in fact every man on the job, I expect, has been sleeping.

Trial Examiner EWELL. On the job?

WITNESS. On that tipple.

Trial Examiner EWELL. And is he the only man that ever got fired for it?

WITNESS. No, sir; thinks they fired someone else.

Trial Examiner EWELL. Know who they fired?

WITNESS. Think the other was Sode Mason.

Sode Mason is E. Mason.

We have carefully considered the discharges of Perkins and Mason and are satisfied that they too were discharged because of their Union affiliation. No other employee at the tipple has ever been discharged by the respondent for sleeping during working hours—the act of which these men stood charged—although sleeping on occasion during working hours has not been an uncommon practice among those at work on the tipple. Only a few days preceding Perkins' discharge there had been a marked display of animosity toward Perkins by officials of the respondent, and a threat of cut in wages, because of his Union membership. Mason, despite his 16 years of service with the respondent, was summarily discharged. We do not believe Sharp's testimony of a warning given Mason 2 weeks before. And Sharp's statement that he had not discharged the old employee but merely removed him from the crusher, the only place where Mason

could work, is specious and ironic.¹⁸ The discharges of the two Union men coincided with the time when the Association, which we have found was the creature of the respondent, was seeking recognition as bargaining agent on the claim that it represented a majority of the employees. We are equally satisfied, although not determinative of the issue here,¹⁹ that neither of the employees was asleep, as claimed. In the instance of Mason, Young's testimony corroborates a chronology of events preceding the discharge, as testified to by Mason. There is, moreover, a matter of doubtful fortuity in Sharp's being accompanied by Guthrie, available for replacement, before the need therefor appeared.

At the time of their discharges Perkins and Mason each earned \$8.28 per shift, six shifts per week, or \$49.68 per week. Since their respective discharges, Perkins has earned \$10, Mason nothing.

Chester Perkins and *Arthur Young* also worked on the tipple. Together with *Nap Young*,²⁰ another employee, they constituted one of the regular tipple shifts. All three men belonged to the Union. Young was a strong Union member. At the time the April 1 petitions were circulated he refused to sign although solicited in the presence of Sharp.

On or about July 19 the Perkins-Young shift was discontinued by the respondent without previous warning. The working hours apportioned the discontinued shift, 7½ hours, were divided among the two remaining shifts by increasing the respective hours of each. At the hearing the respondent contended that discontinuance of the shift had been ordered for economy reasons. The record shows, however, that employees on all three shifts were paid on an hourly basis. Any discontinuance of one shift, therefore, attended by a corresponding increase in the hours of the others, merely would result in a proportionate increase in the wages paid the other shifts, and no economy.

Shortly after the discontinuance of their shift Chester Perkins and Young asked Charles Guthrie whether there was any other work for them to do. Perkins had been a coal loader. Guthrie told the men that there was nothing for them. He told Perkins that he, Perkins, had no job, and accused Perkins of "sticking him in the back."

Thereafter, Perkins asked Guthrie to approve the cashing of his wage credit slips. This Guthrie refused saying that Perkins had "joined in with Turnblazer," and was in "bad company." The

¹⁸ We have already pointed out such conduct constitutes a discharge under the Act. See footnote 17.

¹⁹ *Matter of The Kelly-Springfield Tire Company and United Rubber Workers of America, Local No. 26*, etc., 6 N. L. R. B. 325

²⁰ Allegations in the complaint as to the discriminatory discharge of *Nap Young* were dismissed. See footnote 4.

"Turnblazer" mentioned was William Turnblazer, president of the Union. By "sticking him in the back" and "bad company" Guthrie had reference to Perkins' joining the Union.

Some time prior to the discontinuance of the shift Guthrie had made other remarks concerning the Union. Perkins testified that he and Edgar Baird, another employee hereinafter mentioned, were asked by Guthrie why they had joined the Union; that Guthrie then proceeded to speak in derogatory fashion about it; that Baird commented, "Charles, I guess you would fire us if you could," to which Guthrie answered, "You're damn right I would," adding that he could find many reasons for discharging employees besides their Union activities. At the hearing Guthrie denied the conversation as testified to by Perkins. Guthrie's version was that he asked Perkins and Baird, "What is it you fellows are joining the Union around here to make me do. If I find out I will go ahead and do it and stop all this trouble." By "trouble" Guthrie explained that he had meant "All this messing around, dissatisfaction there . . . Well, you know, organizers running over the place . . ." Quite apparent, from Guthrie's own testimony, he was moved to keep his employees from belonging to the Union. From this, as well as his attitude and other statements above-mentioned, we feel he also made the earlier remarks attributed to him by Perkins.

We are of the opinion that the respondent discontinued the shift composed of Arthur Young, Chester Perkins, and Nap Young, by dividing the work hours among the other two shifts, because the three men were members of the Union. The foregoing facts, in the light of the entire record, support such conclusion. The shift having been discontinued for such reason, the loss of employment which resulted constituted a discharge, within the meaning of Section 8 (3) of the Act.

We accordingly find that the respondent discharged Chester Perkins and Arthur Young on July 19 because of their membership in the Union. At the time of their respective discharges each was paid \$5.18 per shift, and worked six shifts per week. Since then neither has earned anything.

Homer Slover was employed as a motorman for 1½ years. He was a member of the Union and continued his membership after recognition had been accorded the Association as bargaining representative. On one occasion York, the foreman, asked Slover if it were not true that he was a member of the Union. Slover replied, "Yes, sir. What do you want to do, fire me now or wait a while?" York answered, "No, don't get me wrong. I just asked how many belong to it." Slover then said, "There is a good many belong to it in my opinion."

On August 27 York discharged Slover allegedly for leaving a ven-

tilation trap-door open for one-half hour, which time was longer than that permitted by a rule of the respondent. Under the rule, motormen are required to keep trap-doors shut except during the several minutes necessary for taking a train through, dropping the cars, and returning.

At the hearing York, called as a witness by the respondent, testified on direct examination that Slover had left the door open a half-hour on the day of the discharge and York discharged him therefor. On cross-examination York testified that he had found the trap-door open after Slover had gone through with his train and assumed that Slover would return shortly; that he, York, then spoke with one "H. C. McCann," another motorman waiting on a side track, who told him that Slover had been through the door about 20 minutes before; that 5 minutes later he, York, returned and closed the trap-door which still was open; that he, York, then sought out Slover and reprimanded him for leaving the door open. York further testified that he did not discharge Slover at that time, or notify him thereof, but discharged him at the end of the shift. York admitted that he did not know of his own knowledge whether Slover had left the door open the asserted half hour; that York only knew of the 5 minutes when he was there; that Slover had never before left the door open an improper length of time.

The respondent also called one H. C. McKeehan as a witness. It is clear from the record that the "H. C. McCann" referred to by York, and H. C. McKeehan are one and the same person.²¹ With reference to Slover's discharge, the following appears in McKeehan's testimony:

Q. Do you know why [Slover was discharged]?

A. [McKeehan] Yes, I know . . . what the boss [York] said he was going to discharge him for.

Q. Well, I don't ask you to tell what the boss said. Where were you when he was supposed to have been discharged.

A. On the side track. . . .

Q. Do you know whether the trap-doors above where you were, were left open?

A. No. I don't know for sure whether it was or not.

Q. [on cross-examination] What did you say about the doors, did you say you saw them, or saw Mr. Slover, or anything of that kind?

A. No, did not say anything about it.

In the light of McKeehan's statement above and York's own admissions, York's direct testimony that Slover had left the trap-door open

²¹ The error is quite evidently typographical.

a half hour, and that that was the cause of the discharge stands completely discredited. All that York knew was that Slover had left the door open 5 or 10 minutes. And, at the hearing, Slover so testified. It is conceded that such a length of time was permissible. We do not believe, particularly in view of McKeehan's denial, that York ever was told by McKeehan that Slover had been through the door 20 minutes. We are satisfied from what McKeehan has testified and the record as a whole that York went to the trap-door with a prior determination to discharge Slover.

The evidence also shows that the respondent's trap-doors are often open for 1 or 2 hours at a time; that upon at least two occasions trap-doors were broken and left open for several days; that no other employee has ever been discharged by the respondent for the reason given Slover.

We are convinced that the claimed ground for the discharge never occurred; that its assertion was a pretext, no less than in other instances above discussed; that the respondent discharged Slover on August 27 because of his membership in the Union. At the time of his discharge Slover earned \$6.56 per 8-hour shift. Since that date he has earned nothing.

Clifford Smithers and *Leslie Smithers*, brothers, worked together as coal loaders at the mine. Both were members of the Union. Fee, the foreman, discharged the two, Clifford on September 3 and Leslie on September 29, in each instance for allegedly working on a "failed shot" without waiting 24 hours after the charge had been set off, as required by a mine rule. Although Fee denied at the hearing that he knew of Leslie's Union affiliation, we have no doubt that he knew of both brothers'. The record shows that a short time before Clifford's discharge Fee approached Clifford and asked how "that damn Union" was getting on, expressing the opinion that it was "about through"; that Clifford had replied, "No, it is just getting started." Leslie had been specifically warned by one Jones, who solicited his membership in the Association, "If you don't, you will be fired."

On Friday, September 3, after Clifford had been at work some 2 hours laying the temporary track and loading 4 cars of coal, Fee came in and discharged him. Clifford testified that Fee asked whether he knew that there was a failed shot where he was working; that Clifford replied that he did not know and asked when the charge had been set off; that Fee stated, "Wednesday morning between 2 and 3 o'clock"; that Clifford then pointed out that that was more than 24 hours previous; that Fee merely replied "You can go see Frank [Sharp] about it." Sharp affirmed the discharge.

The time when the powder charge in question was placed and failed to detonate was not established by the respondent. The placing of charges in the mine wall, and setting them off, are done by

employees known as shot firers. Clifford was given no notice and had no knowledge of any failed shot at the time he commenced work. Although the respondent failed to introduce in evidence its printed copy of the rule, the proof sufficiently shows that the rule not merely prohibits loading in the vicinity of a failed shot until 24 hours have elapsed, but provides that during such period the working place where the shot failed to detonate must be barricaded and warning notices posted. The taking of these precautionary measures rests with the shot firers in the first instance, and with the foreman, in general. Elsewhere Fee testified that he "always blocks off those places until they are made safe." In view of the want of proof regarding the time when the shot in question was placed, and the failure of the respondent to give the required warnings, we find no reason for disbelieving Clifford's testimony that Fee had admitted that the shot had been placed on the preceding Wednesday.

Leslie Smithers was absent from work on the day Clifford was discharged. On September 29 Leslie was discharged under substantially similar circumstances. Leslie had been at work about 2 hours when Fee came in and stated that Leslie was working with a failed shot in his place. Leslie previously had examined the working place and found no holes indicating the presence of failed charges. No barricade had been raised or notices posted. Leslie told Fee he did not know of any failed shot. Fee then turned his light toward the rib, several feet away from the working face, and found the shot. The coal on the rib where the hole was located was not cut, and the hole itself was filled and covered with coal dust. At the hearing, Fee claimed that the hole was only 4 feet from the working place. Leslie testified that it was 15 feet. From Fee's own testimony in general, as well as Leslie's, it satisfactorily appears that the hole was considerably further than 4 feet from the working place.

We are convinced, by the absence of any satisfactory showing that either Clifford or Leslie in fact had worked within 24 hours after a failed shot, by the unexplained lack of due warning by the respondent to either employee of the presence of the danger whose supposed ignoring justified his discharge, by the unusual placement of the shot hole in Leslie's case, and the record that neither man on the day of his discharge was working in a place where a shot had failed within the time alleged. We also are convinced that Fee knew this. The true reason for the discharge of the Smithers brothers lies elsewhere, in their continued Union membership. Clifford and Leslie were the only employees ever discharged by Fee, except one unidentified person discharged some 2 years previous, for "working a failed shot." The shot firer who placed the shot in Leslie's case

is still employed by the respondent despite his failure to erect barricades and post notices. The respondent does not even appear to have disciplined him. As heretofore stated, Fee participated in the discharge of Lee Cornett, for Union affiliation and activities. We are satisfied that he did likewise in connection with Clifford and Leslie Smithers. We find that the respondent discharged these employees because of their membership in the Union. At the date of his discharge Clifford Smithers averaged in earnings \$5.40 per shift. His earnings since have been not more than \$4.

Albert Goins was a shot firer at the mine for 5 years. He was discharged by the respondent on September 30 for using a motor to transport explosive powder, in violation of a mine rule. Goins was a known Union member. He refused to join the Association although solicited several times. On one occasion his affiliation caused Charles Guthrie to accuse Goins of "pinching him in the back," and to threaten to "get even."

At the hearing Goins conceded the use of a motor to transport powder, but took the position that such use was a common practice at the respondent's mine, ordered and acquiesced in by the respondent's officers and supervisory force. Goins testified that he had followed the practice during his entire employment as a shot firer; that the mine superintendent told him to do so as early as February 1933; that Collier, the foreman, had observed such use numerous times; that in at least one instance Charles Guthrie furnished him with a motor; that other shot firers customarily used motors, and on some occasions cutting machines, which are more dangerous. Other witnesses testified to the same effect: Harbin, that he had seen Goins use a motor a year previous to the discharge and again 2 or 3 days before; Mason, that as motorman he had been instructed by his foreman to leave his motor out for use by the shot firers; Collins, that he and the shot firers on 13 or 14 crews transported powder on a cutting machine which is more dangerous because it gives off more sparks than a motor.

At the hearing Collier denied ever having seen Goins use a motor, and Guthrie that he ever furnished Goins one. No denial was made that other shot firers followed the practice.

The record amply supports the contention of Goins. It is evident that whatever rule or other prohibition may have existed, it was the established practice and usage at the mine for shot firers to employ motors at the respondent's mine, that this practice was acquiesced in, if not authorized, by the respondent. Any mine rule governing the situation long had fallen into disuse.

In this circumstance, little credence can be given the respondent's contention that it discharged Goins for using a motor in the course of his work. Of greater relevance is Guthrie's threat to "get even"

with Goins because of his Union membership. The true cause of Goins' discharge was no different than that in the other cases we have considered. We find that the respondent discharged Goins on September 30 because of his membership in the Union. Goins then was earning \$6.56 per shift. He has earned nothing since.

Earl Shakelforth, Charles Osborne, Oley Bates, and David Davis were discharged by the respondent on various dates, respectively, during the period under review. While there is some inference in the record of discrimination, within the meaning of Section 8 (3) of the Act, the evidence is not sufficient to support a finding that such discrimination occurred in regard to any of these men. Although Shakelforth was discharged on the same day that he joined the Union, the testimony of himself and his foreman, Emery, indicates that the cause of the discharge was Shakelforth's refusal to repair the track leading to his working place which a motorman had torn up by accident. Osborne was discharged when he refused to remove some six or seven cars of rock for which no compensation would be paid him. Coal loaders are expected to do an amount of such work and there is no showing that the amount in question was unusual. Oley Bates and David Davis were discharged after they had been arrested for participation in a brawl in which gun shots were fired. While Bates and Davis do not appear to have been responsible for the occurrence, such want of culpability does not establish that their discharge was discriminatory.

We find that the respondent has discriminated in regard to the tenure of employment of Charles Gibson, J. Latham, Blane Stephens, Ray Walters, Lee Cornett, Albert Young, O. Perkins, E. Mason, Chester Perkins, Arthur Young, Homer Slover, Clifford Smithers, Leslie Smithers, and Albert Goins, thereby discouraging membership in the Union; that by such acts, and by other acts herein mentioned, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

We find that the respondent has not discriminated in regard to the hire or tenure of employment or of any term or condition of employment of Earl Shakelforth, Charles Osborne, Oley Bates, and David Davis.

D. Discrimination as to terms and conditions of employment

Johnston Sweeney was the head trackman in one of the sections at the mine, and together with one Goodman constituted the regular track crew. Both men were Union members. Sweeney was solicited to join the Association but refused. Shortly after the solicitation, the foreman in the section added two new trackmen to Sweeney's crew

and the following week laid off Sweeney and Goodman. Both men went to see Sharp about the matter and were told that it had been found necessary to decrease the number of trackmen in that section to two. Sweeney was assigned work as a coal loader under York. Coal loaders are paid on a tonnage basis.

In his new job Sweeney experienced great difficulty in securing cars for loading purposes. Complaint to York and Sharp brought no result. On one occasion Sweeney accused the motorman who brought the cars of not furnishing him enough because he was a Union member. The next day Sweeney received six cars; the following, none. Further complaint by Sweeney resulted in Sweeney's being transferred to another working place where he was doubled up with Elmer Perkins. As chief trackman Sweeney had earned \$5.60 per 7-hour shift and had worked 8 to 10 shifts per week. After the transfer his earnings depreciated considerably.

At the hearing Sharp testified that Sweeney had been transferred from track work to make room for a machineman. No explanation was offered why in the week preceding the transfer the respondent had deemed the work so abundant as to add two new men to the crew, nor why neither of these two men was transferred when the need for transfer arose.

The conduct of the respondent in regard to Sweeney can only be interpreted as moved by an intent to single him out for his adherence to the Union and to discriminate against him by preventing him from earning the rewards which his capacity and willingness would bring. There is no mistaking the plan pursued to deprive Sweeney of rights guaranteed by the Act. To afford it an excuse for removing Sweeney, along with Goodman, from a position where his earnings were computed on a shift basis, two new trackmen were added to Sweeney's crew, and Sweeney and Goodman then laid off. To defeat the possibility of his sustaining at coal loading the amount of his earnings, the respondent furnished him an insufficient number of cars. That it was of equal advantage to itself to provide the necessary cars did not deter the respondent. When Sweeney repeated his complaint he was doubled up with Elmer Perkins, mentioned below, the necessary result of which was to hamper the work of both men and prevent each from earning as much.

We find that the respondent discriminated against Sweeney in regard to terms and conditions of employment, thereby discouraging membership in the Union.

Elmer Perkins, a brother of Chester Perkins, heretofore mentioned, worked on the tippie for 2 years. Shortly after his joining the Union Elmer Perkins was told by Charles Guthrie that his workday was being decreased to 7 hours because he had "been running around in

bad company." The statement was substantially the same as that made by Guthrie to Chester and O. Perkins, set forth above. On July 6 Elmer Perkins was transferred from his job on the tipple to coal loading, likewise in York's section. He was assigned a dangerous and poor working place, doubled with one Davenport. Thereafter, Davenport was assigned a working place elsewhere and Sweeney was moved in with Perkins as above stated. Perkins' job on the tipple was given to one Leonard, the secretary-treasurer of the Association. The job on the tipple was strategically located from the standpoint of affording Leonard daily contact with the mine employees.²² Perkins, when working on the tipple, had earned \$7.99 per 12-hour shift. In June he earned \$119. After the transfer to coal loading, his earnings precipitately dropped to \$23.76, for July.

Sharp testified that Perkins was transferred from the tipple to make room for a motorman. Why this should have resulted in Perkins' position being given to Leonard is not satisfactorily shown. Perkins' service during his 2 years on the tipple was competent. Nor is adequate explanation made for Perkins being doubled with Davenport, or the exchange of Davenport for Sweeney. It is customary practice at the mine not to double men up because of the consequent lessening of production, particularly where the working place is poor and dangerous, nor to shift a coal loader until it is infeasible to work further the place assigned. York testified that the only available working place for Perkins was with Sweeney. However, Perkins, as stated above, was doubled not with Sweeney but with Davenport, until Davenport was assigned a different working place. York, we have said, was not a credible witness. His testimony with respect to Sweeney, and otherwise, is completely unconvincing.

We are satisfied that the respondent transferred Perkins from the tipple in order to reduce his earning power, that this was done because of his Union membership. We find that the respondent discriminated against Perkins in regard to terms and conditions of employment, thereby discouraging membership in the Union.

Nead Patterson was employed as a coal loader. Before joining the Union, he, along with two other coal loaders, was assigned and worked an 8-car wall, approximately 80 feet in width. Patterson joined the Union, and it is uncontroverted that his foreman knew about it. Almost immediately Patterson was changed to a 1-car wall, not more than 16 feet wide; track which he needed to bring the cars into the place was not furnished; the coal was not shot properly. As a consequence, Patterson's average daily production, which during the 6 months preceding his transfer was 10.42 tons per day, fell dur-

²² See *Matter of Atlantic Greyhound Corporation and Brotherhood of Railroad Trainmen*, 7 N. L. R. B. 1189.

ing the succeeding 24 workdays to 9.2 tons per day. His earnings decreased correspondingly. On August 9 Patterson quit. We have no doubt that the respondent, in transferring Patterson, likewise discriminated against him in regard to terms and conditions of employment.

One year previous, in June 1936, Patterson's mother died, and the funeral expenses were paid out of a burial fund maintained by the respondent to which all employees contributed an assessed monthly payment. A few weeks later Patterson left his work, but returned in October 1936. Thereafter he regularly paid the monthly burial assessments. On July 19, 1937, after Patterson joined the Union, Charles Guthrie presented a bill in the amount of \$90 for funeral expenses in connection with the death of Patterson's mother, and until Patterson quit on August 9, deductions were made from his daily earnings on account thereof. Prior to July 19 no demand ever had been made for such payment, nor does it appear that Patterson was expected to do so. We have grave suspicion that the charge was another act of discrimination against him. However, we are unable so to find on the record presented. Neither the rules of the burial fund, nor the details of its creation, are shown.

Edgar Baird and *Roy Brannin* are coal loaders and members of the Union. Their affiliation was known to the respondent. Baird has been mentioned above in connection with the discharge of Chester Perkins. The record shows that in June, about the same time that the Perkins incident occurred, Clyde Guthrie approached Baird and said, "Baird, you bring the Union on us." Baird answered, "No, I didn't bring it on. It was already here." Clyde then said, "You have been agitating it."

Baird worked alone in a working place 24 feet wide, with room for two cars. Commencing with June 22 he began receiving an insufficient number of cars in which to load his coal. One week later Brannin was doubled with him, and another coal loader given Brannin's place. The number of cars continued to be inadequate. A complaint to York met with no success. The record shows that at that time another coal loader in the same section, one Johnson, who had joined the Association, was given as many cars as Baird and Brannin together received. Whereas during the 6 months prior to June 1937 Baird's average daily production was 12.66 $\frac{2}{3}$ tons, during the 38 working days from June 22 to September 30 his daily average was 10.06 tons. Brannin's average daily production of 14.068 tons in 6 months prior to June 29, the date he was doubled, dropped to 10.777 tons during the 38 working days from June 29 to September 30. The earnings of the two men decreased accordingly.

York testified that Brannin and Baird were doubled because "the

super told me to rush that head." The reason for the rush, if any, is not shown, nor if such was the case, why the men were not given what cars they needed. As we have said before, York's testimony warrants no belief. We find that the respondent discriminated in regard to the terms and conditions of employment of Edgar Baird and Roy Brannin, respectively.

James Wilburn and *Tom McIntyre* are coal loaders at the mine and active union members. Wilburn was vice president of the Union local and active in soliciting memberships. On July 6 the men were doubled together in a narrow working place large enough for only two cars. Neither had been doubled before except on rare occasions. Eight or ten other members of the Union at work in the same section likewise were doubled. Some 3 days later Wilburn and McIntyre began having difficulty in securing cars. Wilburn's average daily production of 11.21875 tons, maintained during the 6 months preceding July, fell to 6.941 tons during the succeeding 34 working days from July 6 to September 30, 1937. McIntyre's daily average of 10.40244 tons in the 6 months preceding July dropped to 6.3846 tons in July, August, and September, covering some 36 working days.

The respondent sought to show at the hearing that Wilburn and McIntyre were assigned a good working place, although it is not denied that they were furnished an insufficient number of cars. We are satisfied, however, from the foregoing facts and record, and find, that the respondent discriminated against the two employees in regard to their terms and conditions of employment in order to lessen their earnings, thereby discouraging membership in the Union.

Fred Day is a coal loader in York's section. His membership in the Union and activities were the subject of inquiry by York. Sometime in June or July, Day was asked by York if he was a union member, York saying "If you belong to it, I will find it out." Day replied, "Well, I don't doubt that. I don't doubt that you already know, as far as that is concerned." Within a few days Day was transferred from his working place on a 5-car wall, about 50 feet wide, to a narrow place and "doubled." His former place was given others. The number of cars thereafter furnished him was inadequate. Day's average daily production, which during the 6 months prior to July was 11.2754 tons, was 5.75 tons during 8 working days in August and September. Since the exact date when the alleged discrimination commenced is not known, the month of July cannot be considered.

York testified that Day was transferred because the roof where he worked was bad, that he failed to work his new place properly, and is a careless worker. If the roof were bad it is not explained why others were put to work there the day after Day was trans-

ferred. Day was entitled under the mine practice above mentioned to load coal there as long as feasible. Nor does Day's record of production in the 6 months before his transfer support the claim of incompetency. York's testimony, as has been stated, can be given no weight, and our opinion in that regard obtains here. The respondent urges further that Day was furnished as many cars as other coal loaders in the section. This allegation, if true, is without significance, for numerous other discriminations of similar character against members of the Union occurred in York's section during that period.

We are of the opinion that Day was transferred and doubled for the purpose of reducing his earnings, that the respondent thereby discriminated in regard to his terms and conditions of employment and discouraged membership in the Union.

Ned James and *Ernest Flucker* work together as coal loaders. Both belong to the Union. On or about July 15 one Gaston solicited another employee to join the Union in the presence of James. A few days later Charles Guthrie accused James of soliciting members, and upon James' denial thereof threatened: "If I hear you say any more about that damn Union, I will stop you in the mountain." Thereafter, for a period of 2 weeks, the coal in James and Flucker's working place was not shot although it had been cut. As a consequence, the men lost 3 of the 5 remaining workdays in July. On July 29 Flucker asked Clyde Guthrie to authorize the cashing of a wage credit slip, in order to save the usual 15-per-cent discount charged by the respondent for cashing wage slips. Guthrie first spoke with the bookkeeper about it, and then asked Flucker for his full name.²³ Upon being told it, Guthrie refused, saying that "George Titler" would "okay it." Titler was one of the organizers of the Union in Harlan County.

Witnesses called by the respondent testified that the coal had not been shot during the 2 weeks because of an alleged failure of James and Flucker to "rock dust" their working place. Rock dust sometimes is spread over coal to lessen the possibility of coal dust explosion. It is not clear that the mine rules of the respondent require rock dusting, and the proof is that such is not the general practice of its employees. Whether James and Flucker used rock dust in their work does not appear. As a whole, the witnesses were vague on material points; the testimony of one Dickerson related to undated occurrences.

We are of the opinion, in view of the time relationship between the failure to shoot the coal and Clyde Guthrie's threat, as well as the record as a whole, that the failure to shoot the coal for 2 weeks was not induced by any matter of rock dusting, but by a desire

²³ The respondent employs another coal loader named Herman Flucker

to warn James and Flucker in regard to the Union through leaving the two employees without work for that period. This is supported by the hostility shown Flucker by Clyde Guthrie, above-mentioned. We find that in not providing the men with work in the 2 weeks, the respondent discriminated in regard to their terms and conditions of employment, thereby discouraging membership in the Union. James' average daily production in the 6 months preceding July was 10.2078 tons. Flucker's is not shown.

The evidence shows that while the respondent's acts of discrimination were being committed against members of the Union, an entirely different attitude was being displayed toward members of the Association. Members of the Association who worked at coal loading were given favorable working places, and no instance is shown of Association members being transferred to poorer jobs. When the respondent allegedly found it necessary to eliminate shifts or otherwise decrease the working force, members of the Union were selected to bear the brunt of the change. No attempt has been made by the respondent to disprove or explain its contrasting manner of treatment of the members of the two organizations.

The respondent argues broadly that the acts, upon which the charged discriminations as to terms and conditions of employment rest, are mere incidents arising in the usual course of mine operations; that working places in mines vary and coal loaders are expected to take the poor as well as the good places; that it is not always possible to furnish each coal loader with an adequate number of cars or to cut and shoot his coal promptly; that on occasion it is necessary to double coal loaders in order to provide wider employment until additional working places are made available. While the respondent's portrayal of conditions of employment of coal loaders in the industry may be an accurate statement, it does not explain the acts of discrimination above discussed. The explanation does not square with such conduct as the respondent's transfer of employees from track work or work on the tippie to coal loading.

The chief difficulty with the respondent's contention, however, is that it presupposes that all coal loaders were accorded the same treatment by the respondent and were subject to the same working conditions. As stated, the record amply establishes otherwise. Only members of the Union are shown to have sustained the unfavorable conditions of employment which resulted in marked decreases in earnings. Their complaints to York and Sharp brought no remedy of conditions; on the contrary, Sweeney's complaint to Sharp resulted in a vituperative outburst by Sharp. We observe that York's name appears prominently in the matter. Five of the employees who suffered adverse working conditions were employed in York's

section. Sweeney and Perkins were transferred from track work and the tipple, respectively, to York's section. As set forth above, it was York who discharged three employees for their activities in the Union. We equally are satisfied of his complicity in the respondent's campaign to forestall the growth of the Union by discriminations in regard to terms and conditions of employment. While some doubt might arise, although we have none, in respect to individual employees, above mentioned, we cannot escape the conclusion upon a collective view of the facts in regard to all the above employees, that the respondent has engaged in a series of discriminations against Union members. This was part of a concerted campaign to oppose to the utmost the membership of its employees in the Union, first by attempting to keep the organizers out of Yancey, then by causing the formation of the Association as a rival labor organization, and finally by the discharges of, and other discriminatory acts against, those who belonged to the Union.

Lumus Lundy, Murphy Pierce, Leonard Boswell, Charles Hicks, Jack Calvin, Henry Lasley, and O. L. Nelson, and each of them, are not shown by the record before us to have been discriminated against by the respondent in regard to any term or condition of employment. Lundy's average daily earnings did not decrease after he joined the Union, and the diminution in number of workdays allotted him coincided with a slack period at the mine and general irregular employment. Pierce's doubling up on July 3 does not appear attributable to any discrimination but to a normal mine condition, existing only temporarily and without material loss to him in earnings. His lay-off for 6 working days, because of absence from work without permission, was the customary penalty imposed by the respondent in such cases. Boswell's receiving a lesser number of cars is unconnected with his Union membership and appears to have been caused by a temporary condition at the mine. While Hicks is shown to have sustained a loss in earnings during the 2 weeks just prior to the hearing, such loss occurred after the issuance of the complaint, and accordingly cannot be considered. While there is some evidence of Calvin, Lasley, and Nelson's having been doubled up and furnished an insufficient number of cars, the proof is too uncertain and lacking in material detail to establish discrimination. None of these men sustained any material loss in earnings.

We find that the respondent has not discriminated in regard to any term or condition of employment of Lundy, Pierce, Boswell, Hicks, Calvin, Lasley, and Nelson, or of any of them, as charged in the complaint, as amended.

We have found, heretofore, that the respondent has discriminated in regard to the terms and conditions of employment of Johnston

Sweeney, Elmer Perkins, Nead Patterson, Edgar Baird, Roy Brannin, James Wilburn, Tom McIntyre, Fred Day, Ned James, and Ernest Flucker, and each of them, thereby discouraging membership in the Union. We further find that by such acts, and by other acts herein mentioned, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

We have found that the respondent has dominated and interfered with the formation and administration of the Association and has contributed support to it. In order to effectuate the policies of the Act and free the employees of the respondent from such domination and interference, and the effects thereof, which constitute a continuing obstacle to the exercise by the employees of rights granted them by the Act, we shall require the respondent to withdraw all support and recognition from the Association, to disestablish it as a representative of the employees for the purpose of dealing with the respondent, and to cease giving effect to any contract it may have entered into with said Association in respect to rates of pay, wages, hours of employment, or other conditions of employment. In view of our order in this regard, we will deny the application of the Association, contained in its answer, for certification of itself as collective bargaining representative of the respondent's employees.

The respondent will, in addition, be required to cease and desist from other of its unfair labor practices specified above, and to take such action hereinafter set forth, essential to effectuate the purposes and policy of the Act.

We have found that the respondent has discriminated against certain of its employees by discharging them because of their Union membership and activities. We shall, to effectuate the purposes and policy of the Act, order the respondent to offer them immediate and full reinstatement to their former positions, with back pay, displacing, if necessary, any employees since employed therein. With respect to four of said employees, Charles Gibson, J. Latham, Chester

Perkins, and Arthur Young, the record shows that their, or some of their, respective former positions may have been abolished. If, for that reason, any or all of said employees cannot be reinstated to his or their former position, we shall, in addition, order the respondent to offer such employee, or employees respectively, immediate and full reinstatement to substantially equivalent position or positions, with the right to be reinstated to or employed in a like position as the former position, in his or their respective former classification, if and when a vacancy in such classification occurs, prior to the hiring or transferring of any other employee to work in such position.

The respondent also has been found to have discriminated against certain employees in regard to terms and conditions of employment. With respect to Johnston Sweeney and Elmer Perkins we shall order the respondent to offer these employees immediate and full reinstatement, with back pay, to their former positions as trackman and on the tippie, respectively, displacing, if necessary, any employees since employed in, transferred to, or otherwise assigned said positions. With respect to Edgar Baird, Roy Brannin, Fred Day, Tom McIntyre, Nead Patterson, and James Wilburn, we shall require the respondent to make them, and each of them, whole for any loss of wages, earnings, or pay they have suffered by reason of said discrimination, by payment to each of a sum of money equal to an amount computed by multiplying the figure set forth opposite his name in the column entitled "Number of Tons," appearing in appendix "A," attached hereto and made part hereof, by the amount paid per ton as compensation by the respondent to such employee for coal loading during the period when the respondent discriminated against him, said period having heretofore been found and set forth opposite his name in said appendix "A" in the column entitled "Period." The figures set forth in said column entitled "Number of Tons" represent total tonnage loss occasioned by the respondent's discriminatory acts, and were determined in the case of each said employee in the following manner: There first was computed in the instance of each said employee, the average number of tons loaded by him per day throughout the period from the date²⁴ of the commencement of the respondent's discrimination against him, to, but not including, the date of issuance of the complaint. There then was subtracted, with respect to each said employee, his said respective daily

²⁴ At the hearing the respondent contended that in determining any tonnage loss of each said employee, comparison should be made between the average daily tonnage production of said employee during the 6-month period prior to April 1, 1937, and his daily average tonnage production during the 6 months subsequent to that date. Counsel for the Board acquiesced in the use of a 6-month period as the basis for comparison, provided that instead of the line of demarcation being April 1, 1937, in all cases, it be in each instance the date when the respective discrimination began. We think that counsel stated the proper basis for the comparison.

average number of tons, so computed, from the average number of tons loaded per day by such employee during the 6-month period preceding the said date of the commencement of discrimination. The result reached in each case was then multiplied by the number of days respectively during which the discrimination occurred, said number appearing opposite the name of each said employee in the column entitled "Number of Working Days" in said appendix "A."

With respect to Ernest Flucker and Ned James, we have found that each lost 3 days of work by virtue of the respondent's discriminatory acts. Each of these employees shall be paid by the respondent a sum of money equal to an amount computed by multiplying his average daily loading production during the 6-month period preceding July 1937, by three, and then multiplying the amount so reached by the amount paid him per ton as compensation for coal loading on July 13, 1937, the day preceding the last 5 working days in July when their discrimination occurred.

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

CONCLUSIONS OF LAW

1. United Mine Workers of America, District 19, and Yancey Workmen Association, Inc., are labor organizations, within the meaning of Section 2 (5) of the Act.

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

3. The respondent, by dominating and interfering with the formation and administration of Yancey Workmen Association, Inc., and by contributing support to said organization, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (2) of the Act.

4. The respondent, by discriminating in regard to the tenure of employment of Lee Cornett, Charles Gibson, Albert Goins, J. Latham, E. Mason, Chester Perkins, O. Perkins, Homer Slover, Clifford Smithers, Leslie Smithers, Blane Stephens, Ray Walters, Albert Young, and Arthur Young, and by discriminating in regard to the terms and conditions of employment of Edgar Baird, Roy Brannin, Fred Day, Ernest Flucker, Ned James, Tom McIntyre, Nead Patterson, Elmer Perkins, Johnston Sweeney, and James Wilburn, and thereby discouraging membership in the Union, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

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

6. The respondent has not discriminated, and is not discriminating in regard to hire or tenure of employment, or any term or condition of employment of Oley Bates, Leonard Boswell, Jack Calvin, David Davis, Charles Hicks, Henry Lasley, Lumus Lundy, O. L. Nelson, Charles Osborne, Murphy Pierce, and Earl Shakelforth, 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, Harlan Fuel Company, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) In any manner dominating or interfering with the administration of Yancey Workmen Association, Inc., or with the formation or administration of any other labor organization of its employees, and from contributing support to said Association, or to any other labor organization of its employees;

(b) Discouraging membership in the Union or any other labor organization of its employees by discriminating in regard to hire and tenure of employment or any term or condition of employment, whether in regard to laying off, discharging, transferring, or doubling employees, or in assigning them working places, furnishing them necessary facilities for work, or otherwise;

(c) Interfering in any manner with the right of any agent, representative, officer, member, or organizer of the Union, or of any other labor organization, or with the right of any person, in his entering upon and traversing the paths, roads, streets, or other ways of ingress and egress, public or private, in the town of Yancey, Kentucky, customarily used by the respondent's employees there residing and persons engaged in lawful transactions with them, for the purpose of consulting, conferring or advising with, talking to, meeting, or assisting, the respondent's employees or any of them, in regard to the rights of said employees under the Act to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection;

(d) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively

through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act;

(e) Giving effect to any and all contract or contracts it has or may have entered into with Yancey Workmen Association, Inc., as the representative of any of its employees in respect to grievances, labor disputes, rates of pay, wages, hours of employment, or other conditions of employment.

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

(a) Withdraw all recognition from Yancey Workmen Association, Inc., as the representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, rates of pay, wages, hours of employment, or other conditions of employment, and completely disestablish said Association as such representative;

(b) Offer to Lee Cornett, Albert Goins, E. Mason, O. Perkins, Homer Slover, Clifford Smithers, Leslie Smithers, Blane Stephens, Ray Walters, and Albert Young immediate and full reinstatement to their former positions without prejudice to their seniority and other rights and privileges, displacing, if necessary, any employees since hired, transferred or otherwise assigned to work in said positions;

(c) Offer to Charles Gibson, J. Latham, Chester Perkins, and Arthur Young immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges, displacing, if necessary, any employees since hired, transferred, or otherwise assigned to work in said positions; and if said positions or any of them have or has been abolished, offer to each whose position has been so abolished reinstatement to and employment in a position substantially equivalent to his former position with the right to be reinstated to a like position as his former in his respective former classification if and when a vacancy therein occurs, prior to the hiring or transferring of any other employee to work in such position, and without prejudice to his seniority and other rights and privileges;

(d) Make whole Lee Cornett, Charles Gibson, Albert Goins, J. Latham, E. Mason, Chester Perkins, O. Perkins, Homer Slover, Clifford Smithers, Leslie Smithers, Blane Stephens, Ray Walters, Albert Young, and Arthur Young, for any loss in pay they, or any of them, may have suffered by reason of their discharge, by payment to each of them, respectively, of a sum of money equal to that which he normally would have earned as wages during the period from the date of his respective discharge until the date of the offer of reinstatement, less the amount, if any, which he may have earned during such period;

(e) Offer to Johnston Sweeney immediate and full reinstatement to the position in which he formerly was employed on or about May 30, 1937, in track work, and to Elmer Perkins, to the position in which he formerly was employed on or about July 6, 1937, on the tippie, without prejudice to their seniority and other rights and privileges, displacing, if necessary, any employees since hired or transferred to work in said position; and make whole said Sweeney and said Perkins for any loss they may have suffered by reason of the respondent's discrimination against them in transferring them from their former positions to coal loading on said dates, by payment to each of them, respectively, of a sum of money equal to that which he normally would have earned as wages in his said former position during the period from the date of his said transfer to the date of the offer of reinstatement, less the amount, if any, which he may have earned during such period;

(f) Make whole the employees listed in appendix "A" for any loss of pay they may have suffered by reason of the respondent's discrimination in regard to terms or conditions of employment, by payment to each of them, respectively, of a sum of money equal to an amount computed by multiplying the figure set forth opposite his name in the column entitled "Number of Tons," in said appendix, by the amount paid per ton as compensation to him for coal loading during the period when the respondent so discriminated against him, said period being set forth opposite his name in the column entitled "Period" in said appendix;

(g) Make whole Ernest Flucker and Ned James for any loss of pay they may have suffered by reason of the respondent's discrimination in regard to terms or conditions of employment, by payment to each of them, respectively, of a sum of money equal to an amount computed by multiplying his average daily loading production during the 6-month period preceding July 1937, by three, and then multiplying the amount so reached by the amount paid per ton as compensation for coal loading on July 13, 1937;

(h) Post immediately, and keep posted for a period of at least thirty (30) consecutive days from the date of posting, notices in conspicuous places in and about the mines, at the tippie, and at the commissary, stating that the respondent will cease and desist in the manner set forth in 1 (a), (b), (c), (d), and (e), and that it will take the affirmative action set forth in 2 (a), (b), (c), (d), (e), (f), and (g), of this order;

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

And it is further ordered that the complaint, in so far as it alleges that the respondent has discriminated in regard to the hire

and tenure of employment, or any term or condition of employment of Oley Bates, Leonard Boswell, Jack Calvin, David Davis, Charles Hicks, Henry Lasley, Lumus Lundy, O. L. Nelson, Charles Osborne, Murphy Pierce, and Earl Shakelforth be, and the same hereby is, dismissed.

And it is further ordered that the application of Yancey Workmen Association, Inc., for certification of itself as a representative of the employees of the respondent for the purposes of collective bargaining be, and the same hereby is, dismissed.

APPENDIX A

Employees	Period	Number of working days	Number of tons
Edgar Balrd.....	June 22 to September 30, 1937.....	38	99.028
Roy Brannin.....	June 29 to September 30, 1937.....	38	125.058
Fred Day.....	August 1 to September 30, 1937.....	8	44.2032
Tom McIntyre.....	July 6 to September 30, 1937.....	36	144.6422
Nead Patterson.....	June 9 to August 9, 1937.....	24	29.28
James Willburn.....	July 6 to September 30, 1937.....	34	145.4435