

In the Matter of ELECTRIC VACUUM CLEANER COMPANY, INC. and
UNITED ELECTRICAL & RADIO WORKERS OF AMERICA, LOCAL 720

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Cases Nos. C-266 and R-353.—Decided July 7, 1938

Electric Vacuum Cleaner Manufacturing Industry—Interference, Restraint, and Coercion: threatening to discharge employees who refused to join company-favored union; aiding union in organizational activities; closing plant—*Discrimination:* discharge, refusing and failing to recall employees after closing down plant; charges of, dismissed without prejudice as to four persons—*Preferential Shop Agreement:* held not to justify employer's refusal to recall employees, where no real notice of terms thereof was given—*Closed-Shop Contract:* held without force or effect, where majority upon which it was based was a direct result of employer's unfair labor practices; employer ordered to cease giving effect to—*Collective Bargaining:* charges of failure to bargain collectively dismissed—*Reinstatement Ordered:* discharged employee; employees not recalled to employment—*Back Pay:* awarded to discharged employee and employees not recalled to employment—*Investigation of Representatives:* controversy concerning representation of employees: rival organizations—*Strike:* sit-down—*Unit Appropriate for Collective Bargaining:* production and maintenance employees excluding clerical and supervisory employees; plant-wide; organization of business; history of collective bargaining relations with employer—*Election Ordered:* date of, to be determined in future.

Mr. Harry L. Lodish, for the Board.

Mr. L. C. Speith and *Mr. H. A. Spring,* of Cleveland, Ohio, for the respondent.

Mr. Sam H. Griff, of Cleveland, Ohio, for the United.

Mr. Edwin F. Woodle and *Mr. Bernard Wachtel,* of Cleveland, Ohio, for the A. F. of L. Affiliates.

Mr. John H. Orgill, of Cleveland, Ohio, for the Cleveland Federation of Labor.

Miss Margaret B. Bennett, of counsel to the Board.

DECISION

ORDER

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE

On April 22, 1937, United Electrical and Radio Workers of America, herein called the United, filed with the Regional Director 8 N. L. R. B., No. 14.

for the Eighth Region (Cleveland, Ohio) a petition alleging that a question affecting commerce had arisen concerning the representation of employees of Electric Vacuum Cleaner Company, Inc., Cleveland, Ohio, herein called the respondent, and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On the same day, the United filed with the Regional Director charges alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of the Act. On May 6, 1937, the National Labor Relations Board, herein called the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide an appropriate hearing upon due notice. On May 11, 1937, the Board, acting pursuant to Article III, Section 10 (c) (2), of said Rules and Regulations, ordered a consolidation of the two cases for the purposes of hearing.

On May 21, 1937, the Board, by the Regional Director, issued its complaint against 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), (3), and (5) and Section 2 (6) and (7) of the Act. A motion to make the complaint more definite and certain having been filed by the respondent, an amended complaint was filed on May 27, 1937. Notice of hearing upon the petition was duly served upon International Molders Union of North America, Local No. 430; Pattern Makers Association of Cleveland and Vicinity; Metal Polishers International Union. Local No. 3; International Association of Machinists, District No. 54; and Federal Labor Union No. 18907; herein jointly called the A. F. of L. Affiliates, all affiliated with the American Federation of Labor, herein called the A. F. of L.; upon the respondent; and upon the United. The complaint and notice of hearing thereon and the amended complaint and notice of hearing thereon were duly served upon the respondent and upon the United. On June 4, 1937, the respondent filed its answer, in which it admitted the interstate character of its business but denied having engaged in unfair labor practices, and prayed that the complaint be dismissed.

Pursuant to the notice a hearing on both the petition and the complaint was held in Cleveland, Ohio, on June 10, 11, 15, 16, 17 and 18, 1937, before William R. Ringer, the Trial Examiner duly designated by the Board. At the hearing the A. F. of L. Affiliates and the Cleveland Federation of Labor were permitted to intervene. The Board, the respondent, the United, the A. F. of L. Affiliates, and the

Cleveland Federation of Labor were represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded to all the parties.

At the end of the Board's case concerning the unfair labor practices, the respondent renewed its motion to dismiss the complaint, which motion was denied by the Trial Examiner. At the same time the Trial Examiner granted a motion by counsel for the Board to amend the complaint to conform to the proof with respect to variations not involving surprise or material changes. The respondent also moved that the petition be dismissed, which motion was denied. These rulings by the Trial Examiner are hereby affirmed.

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

After the close of the hearing briefs were filed by all parties.

On November 1, 1937, both cases were transferred to and continued before the Board.

All parties were granted the right to apply for oral argument; but no applications were made.

Upon the entire record in both cases, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Electric Vacuum Cleaner Company, Inc., a New York corporation, manufactures, sells, and distributes electric vacuum cleaners. It has its principal office and place of business at Cleveland, Ohio, and branches in about 100 cities in the United States and Canada. It controls Premier Vacuum Cleaner Co., Ltd., of Toronto, and one-third of its own stock is held by General Electric Co. About 75 per cent of the raw materials used by the respondent are obtained outside of the State of Ohio, and about 90 per cent of its finished products are shipped out of Ohio.

II. THE ORGANIZATIONS INVOLVED

United Electrical and Radio Workers of America is a labor organization affiliated with the Committee for Industrial Organization, herein called the C. I. O., admitting to its membership all production and maintenance employees of the respondent, excluding office workers and clerical and supervisory employees.

Metal Polishers, Buffers, Platers and Helpers, International Union, Local No. 3, is a labor organization affiliated with the A. F. of L., admitting to its membership all metal polishers, buffers, and platers, and their helpers, employed by the respondent.

International Association of Machinists, District No. 54, is a labor organization affiliated with the A. F. of L., admitting to its membership all machinists employed by the respondent.

International Molders Union of North America, Local No. 430, is a labor organization affiliated with the A. F. of L., admitting to its membership all molders employed by the respondent.

Pattern Makers Association of Cleveland and Vicinity is a labor organization affiliated with the A. F. of L., admitting to its membership all pattern makers employed by the respondent.

Federal Labor Union No. 18907 is a labor organization affiliated with the A. F. of L., admitting to its membership all production and maintenance employees of the respondent, except supervisory employees and employees who are eligible for membership in any of the above-mentioned unions affiliated with the A. F. of L.

III. THE UNFAIR LABOR PRACTICES

A. Interference, restraint, and coercion

Since 1929, the A. F. of L. Affiliates have had some members among the respondent's employees, particularly among the polishers. But by 1935 the A. F. of L. Affiliates had dropped many of their members because they were unable to pay their dues. After this decrease in membership in the A. F. of L. Affiliates, the Mechanics' Educational Society of America, herein called the M. E. S. A., formed a local among the respondent's employees, and in the spring of 1935 conducted a strike for higher wages. During this strike the M. E. S. A. endeavored to negotiate with the respondent, but negotiations came to a deadlock. Efforts of a conciliator from the United States Department of Labor to bring the two sides together were unsuccessful. There is some testimony to the effect that after the strike had gone on about 10 weeks, members of the M. E. S. A. asked aid from the A. F. of L. Affiliates, and that officials of the A. F. of L. Affiliates said they would help the strike only if the strikers joined the A. F. of L. Affiliates. In any case, officials of the A. F. of L. Affiliates solicited members on the M. E. S. A. picket line, but obtained, at the most, about 176 members. At that time the respondent employed about 800 persons. The A. F. of L. Affiliates were able, however, to secure a conference with the respondent and an agreement to negotiate a contract. The A. F. of L. Affiliates then called a meeting of the employees of the respondent and read a contract which they said

would probably be acceptable to the respondent. They asked the employees to join the A. F. of L. Affiliates and to go back to work under the terms of the contract. The majority of the employees voted to join and to go back to work; and immediately thereafter, on June 22, 1935, a written contract was signed. The A. F. of L. Affiliates did not reveal at this meeting that an oral preferential shop contract was also contemplated, providing that persons hired for the first time after the settlement of the strike must join the A. F. of L. Affiliates or be discharged. The respondent and the A. F. of L. Affiliates allege, however, that such a contract was entered into orally immediately after the meeting. This alleged oral preferential shop contract was never reduced to writing. It does not appear that its terms were ever posted or that it was ever announced at any meeting of the employees.

Although the respondent claims that foremen were instructed to inform employees concerning the alleged oral agreement, the testimony does not show that any such instructions were carried out or that employees were otherwise informed. The evidence merely shows that certain employees were aware of a rumor of an oral agreement. There is no showing that the alleged oral agreement was put into effect by the respondent.

In July 1936, the respondent and the A. F. of L. Affiliates executed another written agreement similar to that executed in June 1935. The respondent claims that at the same time it and the A. F. of L. Affiliates made another oral agreement similar to the previous oral agreement. The evidence does not show that the employees were at that time informed concerning the oral agreement or that it was put into effect.

In March 1937, the A. F. of L. Affiliates began a new organizational drive among the respondent's employees, which met with little success. The A. F. of L. Affiliates then turned to and received aid from the respondent. On at least one occasion, the respondent's superintendent, George R. Paulus, accompanied an organizer while he went from machine to machine talking to employees. On several occasions foremen sent groups of employees to the respondent's office, where officials of the A. F. of L. Affiliates, in the presence of officials of the respondent, informed employees that if they did not join one of the A. F. of L. Affiliates they would lose their jobs. The respondent claims that on such occasions the employees were notified of the terms of the oral agreement. The testimony of the employees is to the effect that while at these conferences they became aware of cooperation between the respondent and the A. F. of L. Affiliates, the terms of the alleged oral agreement were not made clear to them. The respondent conceded that persons employed prior to the strike on

June 23, 1935, and therefore not required to join the A. F. of L. Affiliates under the alleged agreement, were among those called in, but claims that such employees were merely asked to help organize the other employees.

On March 18, 1937, Ed Ramsey, a machinist hired prior to June 23, 1935, was discharged for refusing to join one of the A. F. of L. Affiliates. The discharge resulted in a spontaneous sit-down strike in the machine shop. The respondent states that Ramsey's discharge was a mistake and that he was immediately thereafter called to the office but refused to come. Ramsey was not called, however, until after the strike had begun, and he was not told why he was wanted in the office. Moreover, Paulus, the superintendent, testified that he told Ramsey's foremen that Ramsey had been discharged. Paulus clearly knew at the time that Ramsey had been employed prior to June 23, 1935. The evidence is contradictory as to whether Paulus thereafter went into the machine shop and told Ramsey that he was not discharged.

Several days before the sit-down, some of the employees communicated with the C. I. O. relative to organization of the respondent's employees by it; and the C. I. O. began an organizational campaign. When the sit-down began, the C. I. O., at the behest of some of the employees, sent as an adviser Walter E. Scott, who had been an organizer for the M. E. S. A. at the time of the 1935 strike. Scott proposed to the respondent, through the chief of police, a settlement of the strike on the basis of the reinstatement of Ramsey and another employee, whose identity is not clear, and of free choice of union affiliation. The respondent agreed to these terms, provided the A. F. of L. Affiliates would consent. The A. F. of L. Affiliates then consented. Thereupon, on March 19, 1937, the strikers evacuated the plant. The next working day was Monday, March 22, 1937.

On Sunday, March 21, 1937, the respondent announced in the Cleveland newspapers that, in accordance with a letter which it had received from the A. F. of L. Affiliates, its plant would be closed on Monday, March 22.¹ The letter, dated March 20, stated that "as bargaining agent for your employees, we request you to temporarily close your plant, pending present negotiations with you relative to matters covered by our contract with you." The letter resulted from a conference between the respondent and the A. F. of L. Affiliates on March 20, 1937, at which, according to the respondent, the A. F. of L. Affiliates threatened to strike unless the plant was closed.

With the closing of the plant, the membership of the United increased. On March 26, 1937, Sam H. Griff, counsel for the United, telephoned L. C. Speith, counsel for and vice president of the re-

¹ The letter was quoted in full.

spondent, and offered to discuss the reopening of the plant. Speith replied that he would notify Griff if his services were needed, but Griff did not hear from Speith again. On April 2, 1937, the United informed the respondent by letter that a majority of the respondent's employees were members of the United; that the United, instead of the A. F. of L. Affiliates, represented the majority "as to a settlement of grievances arising under the existing contract" and were ready to return to work under its terms; and that all grievances arising under the contract would thereafter be handled by the committee of the United signing the letter.

On April 3 and 4, 1937, the respondent put notices in the papers directed to the respondent's employees, which stated that on July 6, 1936, the respondent, at the employees' request, had entered into a contract with the A. F. of L. Affiliates recognizing them as the employees' duly chosen agents for collective bargaining; that, thereafter, until June 23, 1937, it was agreed that the respondent employ only persons affiliated with the A. F. of L. Affiliates; and that, after conferences with the employees' agents, it was at their request resuming operations April 5, 1937, but only those employees who were members of the crafts under contract with the respondent would be employed.

Thereafter, on May 20, 1937, the respondent entered into a closed-shop agreement with the A. F. of L. Affiliates, designating them as the exclusive representative of the respondent's employees. Any majority which the A. F. of L. Affiliates may have had at this time was clearly the result of the shut-down of the plant by the respondent and the refusal of the respondent to employ persons other than those in good standing with one of the A. F. of L. Affiliates.

It is clear from the foregoing that the respondent, in and after March 1937, aided in the organizational activities of the A. F. of L. Affiliates; threatened to discharge and acquiesced in threats to discharge employees who refused to join the A. F. of L. Affiliates; published statements of intention to close its plant; did on March 22, 1937, close its plant; and on May 20, 1937, entered into a closed-shop agreement with the A. F. of L. Affiliates. The respondent asserts in justification of its acts other than the execution of the closed-shop agreement on May 20 that they were undertaken in order to effectuate the terms of the oral preferential shop agreement with the A. F. of L. Affiliates previously discussed. It is clear, however, that a preferential shop agreement would in no event be a valid basis for many of the acts of the respondent. Furthermore, as set forth above, there is no showing in the record that, at the time the parties allegedly entered into the oral agreement, employees were informed concerning it or that the agreement was then put into effect. Although the respondent claims later to have informed groups of employees concerning the

oral agreement, the evidence indicates that at no time were the terms of any oral agreement made clear to them. Although the respondent states that the oral preferential shop agreement did not apply to persons employed prior to June 23, 1935, the newspaper notices published April 3 and 4, 1937, did not mention any such distinction. The groups of employees whom the respondent called in conference included employees hired prior to June 23, 1935, as well as persons employed thereafter. We find the respondent's reliance upon the alleged oral preferential shop agreement to be without merit.²

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

B. The discriminations as to tenure of employment

The respondent delegated to the A. F. of L. Affiliates the task of putting into effect the policy set forth in the newspaper notice. On the morning of April 5, representatives of the A. F. of L. Affiliates were stationed at the gates of the respondent's plant and no one was permitted to enter without a clearance card from them. New employees were hired to fill the places of employees who were not allowed to return to work. The respondent states that the above procedure was in conformance with the alleged oral contract. It also states that the A. F. of L. Affiliates were instructed to admit all employees not subject to discharge under such oral contract. In actual practice, however, admittance to the plant was refused not only employees hired since June 23, 1935, who were not members of one of the A. F. of L. Affiliates in good standing, but also a number of persons employed prior to June 23, 1935. Moreover, the notice published in the Cleveland newspapers drew no distinction between employees hired prior to June 23, 1935, and those hired subsequently, relative to a return to work. The notice stated that only those persons who were members of one of the A. F. of L. Affiliates would be employed following the close-down.

The complaint alleges that the respondent, on or about April 5, 1937, and at all times thereafter, failed or refused to recall to employment 28 named employees who had been required to cease work when the respondent closed down the plant on March 19.

John Kern, Nicholas Kozma, William Fogarty, and Edward Koutnik. Each was employed by the respondent prior to June 23, 1935, and worked until the plant was closed down on March 22, 1937. None of the four employees belonged to any of the A. F. of L.

² See subsection B hereof for a fuller discussion relative to our views concerning the alleged oral preferential shop agreement.

Affiliates. Although all four employees on April 5, 1937, or shortly thereafter, sought employment, the respondent has failed and refused to recall any of them to employment.

While working for the respondent Kern received 58 cents per hour, Kozma 62 cents per hour, Koutnik 63 cents per hour, and Fogarty 58 cents per hour. Each worked 40 hours per week. At the hearing, Kern testified that since April 28, 1937, he had been employed elsewhere at approximately \$25 per week but that he did not know whether the job was temporary or permanent; Kozma and Koutnik testified that they had been unemployed; and Fogarty testified that he had earned \$8.90 for part-time work.

Steve Dragosa, William Behrse, Howard Lowrance, Alfred Meissner, Arthur Troyan, George Onda, Arthur Kruse, Mitchell France, Mike Smith, Theodore Vitosky, Fred Frank, Harold Keehl, John Masters, and Joseph Macho. Each was also employed by the respondent prior to the 1935 M. E. S. A. strike and until the respondent closed its plant on March 22, 1937. All at one time or another joined one of the A. F. of L. Affiliates, but all had become members of the United before April 5, 1937. Although all the said employees sought employment on or about April 5, 1937, the respondent has failed and refused to recall any of them except Keehl to employment. On April 26, 1937, Keehl was called back to work and worked until May 10, 1937. On the latter date, he was informed by his foreman that he could not work longer because his dues in one of the A. F. of L. Affiliates were not paid. He went to the office of the union, but being unable to pay his dues, did not receive a card or get his job back.

At the time of the hearing, Dragosa had a temporary job, from which he had received about \$230 altogether since the closing of the plant. Onda, Lowrance, Smith, and France have had no employment. On June 4, 1937, Kruse obtained a new job, from which he had earned about \$30 at the time of the hearing. Before the closing of the plant he earned about \$42 a week and had worked for the respondent 7 or 8 years. Behrse and Frank have also received new employment, but it may not be permanent. Altogether Behrse has earned about \$173 since the lock-out, and Frank has earned 60 cents an hour working 9 hours a day. Behrse had worked 12 years for the respondent and earned \$1.05 an hour and Frank had worked 5½ years and earned 58 cents an hour, 40 hours a week. Masters has received new employment, from which he had earned about \$100 at the time of the hearing. At the time of the closing of the plant he had worked 14 years for the respondent and was earning about \$42 a week. Macho has had temporary employment and has received, including relief, about \$205. He had worked 18 years for the

respondent and also earned \$42 a week, working 40 hours a week. Troyan had worked 3 years for the respondent, and received \$42 a week, working 40 hours a week. About 2 weeks before the hearing he obtained new employment.

James Mitchell, Rudolph Rummell, Leo Pierret, Jewel Smith, and Joseph Washko. Each was employed by the respondent subsequent to June 23, 1935, and until the plant was closed down on March 22, 1937. All joined the United before the opening of the plant on April 5. Although Mitchell, Pierret, Smith, and Washko on April 5, 1937, or shortly thereafter, sought employment, the respondent has at all times failed or refused to recall any of them except Mitchell to employment. The respondent gave Mitchell employment on May 19, 1937. Rummell went near the plant on April 5, 1937, but was afraid to go up to the gate. About April 10, 1937, he joined one of the A. F. of L. Affiliates in order to get his job back. For 2 or 3 weeks after that he was ill, but on May 10, 1937, he applied to the respondent for employment. On May 24, 1937, the respondent gave him employment. Mitchell and Rummell testified that they had earned nothing from April 5, 1937, to the date of their reemployment by the respondent.

At the time of the shut-down, Washko and Pierret each worked 40 hours per week and received, respectively, 57 and 56 cents per hour. According to their testimony at the hearing, Washko had earned on a temporary job beginning April 19, 1937, 55 cents per hour for a 40-hour week; Pierret had earned approximately \$8; and Smith had earned nothing.

Edward Rericha. When Rericha, who had been employed by the respondent about 11 years, came to work on March 11, 1937, he found that his time card had been removed. An official of one of the A. F. of L. Affiliates, to which Rericha belonged, told him to go down to the union office. There he was told that he had been discharged because he had been suspended from the union for joining the C. I. O. At this time he did not belong to the C. I. O. but he had been discussing with other employees at the plant the desirability of joining. Subsequently, he was charged with failure to pay dues. Members of his local objected to his suspension from the union, and he was told to go back to work. But by that time the plant had closed, and he has not since been offered reinstatement by the respondent. While the plant was closed he joined the United. On June 11, 1937, he found a job elsewhere. From this job and from relief he has received altogether about \$50 since the shut-down. At the time of his discharge he was earning about \$42 a week, and working 40 hours a week.

The respondent relies upon the alleged oral agreement as justification for its failure and refusal to recall to employment all of the 24 persons discussed above. It claims that under the oral agreement persons

whom the respondent hired subsequent to June 23, 1935, became subject to discharge if they did not join one of the A. F. of L. Affiliates; that although employees hired prior to June 23, 1935, were not required to join one of the A. F. of L. Affiliates they became subject to discharge if they did join but failed to remain in good standing;³ that persons hired prior to June 23, 1935, became subject to discharge if they joined any other union.⁴

It is clear from the evidence presented that the alleged oral agreement was at most merely a preferential agreement whereby the respondent would employ only persons affiliated with the A. F. of L. and that it did not apply to persons employed prior to June 23, 1935. Accordingly, even under the terms of the alleged preferential agreement, the respondent unlawfully discharged the 19 persons here involved who were employed prior to June 23, 1935.

Furthermore, the alleged preferential agreement afforded no justification for the discharge of Mitchell, Rummell, Pierret, Smith, and Washko, who were hired subsequent to June 23, 1935. Indeed, the agreement would furnish no such justification even if substantially a closed-shop agreement as is urged in the respondent's brief. Under Section 8 (3) of the Act, an employer may enter into a closed-shop or preferential agreement with a labor organization not established, maintained, or assisted by an unfair labor practice. The employer may not, however, discharge employees pursuant to such an agreement without any real notice being given of the terms thereof. To hold otherwise would make it impossible for an employee to distinguish between discrimination on the part of the employer in violation of the Act and compliance with an agreement valid under Section 8 (3) of the Act. Where an employee is unable to distinguish between these two types of acts on the part of the employer, he risks jeopardizing his job if, thinking he is merely asserting his rights under the Act, he refuses or neglects to join a designated union. Such a situation would defeat the purposes of the Act.

We have pointed out in Section III (A) above that the employees had no real or reasonable notice concerning the terms of the alleged

³ This contention, presented in the respondent's brief, is not supported even by the testimony of the respondent's witnesses.

⁴ This contention, also presented in the respondent's brief, is likewise unsupported by the testimony of the respondent's witnesses. In support of its contention, the respondent calls attention to the following testimony of its vice president relative to a notice posted in the plant in 1935: ". . . we informed our employees that we had entered into a contract with the various affiliated unions of the American Federation of Labor, having determined that a majority of the employees were members of those various organizations. Having entered into such a contract, any person in our employ in the shop who did anything to disturb the peace and friendly relationship would be considered as working against the best interests of the company and as such was subject to discharge." Joining any union other than one of the A. F. of L. Affiliates, the respondent urges, disturbed this "peaceful and friendly relationship."

oral agreement. Indeed, the acts of the respondent and the notices published by the respondent were contradictory to the terms of the alleged oral agreement. Under the circumstances, the respondent cannot justify its action regarding the aforesaid employees, or any of them, on the basis of the alleged oral agreement.

On the basis of the foregoing, and in accordance with the allegations of the complaint, we find that the respondent, in refusing and failing to recall the aforesaid persons to employment and in discharging Keehl on May 10, 1937, has discriminated against the said employees with respect to hire and tenure of employment in order to discourage membership in the United and encourage membership in the A. F. of L. Affiliates, and has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Frank Erzen, Austin Ballard, Frank Hunek, and William Krall. There is no evidence in the record with respect to the allegations of the amended complaint that the respondent on or about April 5, 1937, and at all times thereafter, failed or refused to recall to employment the said four employees. The portions of the amended complaint which relate to Erzen, Ballard, Hunek, and Krall will therefore be dismissed without prejudice.

C. The alleged refusal to bargain

On April 2, 1937, while the plant was closed down, the United wrote the respondent, stating that a majority of the respondent's employees were members of the United; that the United, rather than the A. F. of L. Affiliates, represented a majority of the employees "as to a settlement of the grievances arising under the existing contract"; that the members of the United recognized the "existing contract" and were ready to return to work immediately under its terms; and that all grievances arising under the contract would thereafter be handled by the committee of the United signing the letter. The respondent did not reply to the letter. R. B. Wilson, a vice president of the respondent, testified that the letter was not received until April 5, 1937, the day the plant reopened.

At the hearing, a United official testified that 623 out of a total of approximately 1,000 employees of the respondent had signed application cards of the United. The official submitted 573 cards for the confidential inspection of the Trial Examiner and stated that approximately 50 additional cards had disappeared from the United's office. Since the United was unwilling to disclose the names of its members to the respondent, the application cards were not submitted in evidence.

The United did, however, put in evidence what purported to be a list of its members as of March 26, 1937, with marks after the names of those who had belonged to one of the A. F. of L. Affiliates but who had stated at a meeting of the United on that date that they wanted to sever their connection with the A. F. of L. The names marked do not constitute a majority of the employees of the respondent at that time, and the evidence tending to establish the identity of the remaining names is insufficient.

We find that the evidence does not establish that the United at any time represented a majority of the respondent's employees within an appropriate unit. We will, therefore, dismiss the amended complaint in so far as it alleges that the respondent has engaged in unfair practices within the meaning of Section 8 (5) 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 have led 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 interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act. We shall order the respondent to cease and desist from such interference, restraint, and coercion.

We have also found that the respondent has discriminated in regard to the hire and tenure of employment of John Kern, Nicholas Kozma, William Fogarty, Edward Koutnik, Steve Dragosa, William Behrse, Howard Lowrance, Alfred Meissner, Arthur Troyan, George Onda, Arthur Kruse, Mitchell France, Mike Smith, Theodore Vitosky, Fred Frank, John Masters, Joseph Macho, James Mitchell, Rudolph Rummell, Leo Pierret, Jewel Smith, Joseph Washko, and Edward Rericha, by failing and refusing to recall said persons to employment on April 5, 1937, or at any time thereafter, except that Mitchell was recalled to employment on May 19, 1937, and Rummell on May 24, 1937. We shall, therefore, affirmatively require the respondent to offer reinstatement to all of said employees except the two who have been reinstated; to pay to the said employees to be offered reinstatement, a sum of money equal to that which each would normally have earned as wages, from April 5, 1937, to the date on which they are offered reinstatement less the amount, if any, which

each has earned during that period; and to pay to Mitchell and Rummell a sum of money equal to that which each would normally have earned as wages from April 5, 1937, to the date on which they were reinstated, less the amount, if any, which each earned from April 5, 1937, to the date on which they were reinstated.

We have further found that the respondent has discriminated in regard to the hire and tenure of employment of Harold Keehl by failing and refusing to recall him to employment from April 5, 1937, until April 26, 1937, and by discriminatorily discharging him on May 10, 1937. We shall, therefore, affirmatively require the respondent to offer reinstatement to Keehl and to pay to him a sum of money equal to that which he would normally have earned as wages from April 5, 1937, to April 26, 1937, and from May 10, 1937, to the date on which he is offered reinstatement, less the amount, if any, which he has earned during the said periods.

VI. THE QUESTION CONCERNING REPRESENTATION

We have noted in Section III above that the United claims to represent a majority of the respondent's employees and has unsuccessfully sought to bargain with the respondent. The A. F. of L. Affiliates also claim to represent a majority of the respondent's employees.

The respondent, however, contends that no question concerning representation exists, because of a closed-shop contract between it and the A. F. of L. Affiliates, dated May 20, 1937. This contract was entered into about a month after the United's petition to the Board had been filed, and after negotiations between the respondent and the A. F. of L. Affiliates, dating back to the shut-down of the plant by the respondent on March 22, 1937. As proof of authority to negotiate the contract, the A. F. of L. Affiliates showed the respondent membership cards of a majority of the production and maintenance employees. It was testified that copies of the contract were signed by 964 out of a total of about 1,032 employees, and 964 signed copies were put in evidence.

This majority, however, was a direct result of the respondent's unfair labor practices in closing its plant on March 22, 1937, and re-employing only those in good standing with one of the A. F. of L. Affiliates. Because of these unfair labor practices the respondent's employees were not free to designate the bargaining agents of their choice, but were compelled to designate the A. F. of L. Affiliates in order to retain their jobs. The contract is, therefore, without force or effect.

We find that a question has arisen concerning the representation of employees of the respondent.

VII. THE EFFECT OF THE QUESTION CONCERNING REPRESENTATION UPON
COMMERCE

We find that the question concerning representation which has arisen, occurring in connection with the operations of the respondent described in Section I above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VIII. THE APPROPRIATE UNIT

The United contends that all of the production and maintenance employees at the respondent's plant, excluding supervisory and clerical employees, constitute a unit appropriate for purposes of collective bargaining. The respondent's plant is organized upon a mass production basis, and the various departments in it are so closely related functionally that, according to the testimony of the respondent's vice president, the plant cannot run unless each department is operated. The A. F. of L. Affiliates and the Cleveland Federation of Labor do not suggest that a plant-wide unit is inappropriate, and the contracts heretofore entered into between the respondent and the A. F. of L. Affiliates have been on a plant-wide basis.

We find that the production and maintenance employees at the respondent's plant, excluding clerical and supervisory employees, constitute a unit appropriate for purposes of collective bargaining and that said unit will insure to the employees at the respondent's plant the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

IX. THE DETERMINATION OF REPRESENTATIVES

We have pointed out above that, although the United claims to represent a majority of the employees of the respondent within an appropriate unit, it has failed to establish this claim. We have also shown that the A. F. of L. Affiliates claim to represent a majority of such employees, but that they have been aided and assisted by the respondent in obtaining members. We find, therefore, that the question which has arisen concerning representation can best be resolved by an election by secret ballot.

We shall not, however, at this time fix the date for the holding of the election since we are of the opinion that the election should not be held until sufficient time has elapsed to permit a free choice of representatives unaffected by the respondent's unfair practices. We shall, at the time we specify the date on which the election is to be held, also specify the date on the basis of which eligibility to vote in the election shall be determined.

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

CONCLUSIONS OF LAW

1. International Molders Union of North America, Local No. 430; Pattern Makers Association of Cleveland and Vicinity; Metal Polishers International Union, Local No. 3; International Association of Machinists, District No. 54; Federal Labor Union No. 18907; and United Electrical & Radio Workers of America are labor organizations within the meaning of Section 2 (5) of the Act.

2. The respondent, by discriminating in regard to the hire and tenure of employment of John Kern, Nicholas Kozma, William Fogarty, Edward Koutnik, Steve Dragosa, William Behrse, Howard Lowrance, Alfred Meissner, Arthur Smith, Theodore Vitosky, Fred Frank, John Masters, Joseph Macho, James Mitchell, Rudolph Rummell, Leo Pierret, Jewel Smith, Joseph Washko, Edward Rericha, and Harold Keehl, thereby encouraging membership in the first five labor organizations mentioned in paragraph 1 above, and discouraging membership in United Electrical & Radio Workers of America, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

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

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

5. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (5) of the Act.

6. A question affecting commerce has arisen concerning the representation of employees of Electric Vacuum Cleaner Company, Inc., Cleveland, Ohio, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

7. The production and maintenance employees of the said company, excluding clerical and supervisory employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) 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, Electric Vacuum Cleaner Company, Inc., and its officers, successors, and assigns, shall:

1. Cease and desist:

(a) From discouraging membership in United Electrical and Radio Workers of America or any other labor organization by discharging, refusing to reinstate, or otherwise discriminating against its employees in regard to hire or tenure of employment, or any term or condition of employment;

(b) From encouraging membership in International Molders Union of North America, Local No. 430; Pattern Makers Association of Cleveland and Vicinity; Metal Polishers International Union, Local No. 3; International Association of Machinists, District No. 54; Federal Labor Union No. 18907; or any other labor organization by discharging, refusing to reinstate, or otherwise discriminating against its employees in regard to hire or tenure of employment, or any term or condition of employment;

(c) From in any other manner interfering with, restraining, or coercing its employees in the exercise of the 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 National Labor Relations Act;

(d) From giving effect to the closed-shop agreement of May 20, 1937.

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

(a) Offer immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges, to John Kern, Nicholas Kozma, William Fogarty, Edward Koutnik, Steve Dragosa, William Behrse, Howard Lowrance, Alfred Meissner, Arthur Troyan, George Onda, Arthur Kruse, Mitchell France, Mike Smith, Theodore Vitosky, Fred Frank, John Masters, Joseph Macho, Leo Pierret, Jewel Smith, Joseph Washko and Edward Rericha;

(b) Make whole the said John Kern, Nicholas Kozma, William Fogarty, Edward Koutnik, Steve Dragosa, William Behrse, Howard Lowrance, Alfred Meissner, Arthur Troyan, George Onda, Arthur Kruse, Mitchell France, Mike Smith, Theodore Vitosky, Fred Frank, John Masters, Joseph Macho, Leo Pierret, Jewel Smith, Joseph Washko, and Edward Rericha, for any loss of pay they have suffered by reason of the respondent's discrimination in regard to their hire and tenure of employment by payment to each of them of a sum of money equal to that which each would normally have earned as wages from

April 5, 1937, to the date of such offer of reinstatement, less the amount, if any, which each has earned during that period;

(c) Offer to Harold Keehl immediate and full reinstatement to his former position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he has suffered by reason of the respondent's discrimination in regard to his hire and tenure of employment, by payment to him of a sum of money equal to that which he normally would have earned as wages during the period from April 5, 1937, to April 26, 1937, and during the period from May 10, 1937, to the offer of reinstatement pursuant to this order, less the amount, if any, which he has earned during the said periods;

(d) Make whole James Mitchell and Rudolph Rummell for any loss of pay they have suffered by reason of the respondent's discrimination in regard to their hire and tenure of employment, by payment to each of them of a sum of money equal to that which each would normally have earned as wages during the period from April 5, 1937, to May 19, 1937, in the case of Mitchell, and during the period from April 5, 1937, to May 24, 1937, in the case of Rummell, less the amount, if any, which each earned during the respective periods;

(e) Immediately post notices in conspicuous places throughout its plant, and maintain such notices for a period of thirty (30) consecutive days from the date of such posting, stating (1) that the respondent will cease and desist in the manner aforesaid; (2) that the respondent's employees are free to join or assist United Electrical & Radio Workers of America or any other labor organization for the purposes of collective bargaining with the respondent or other mutual aid or protection; (3) that in order to secure or continue employment in the plant, a person need not become or remain a member of International Molders Union of North America, Local No. 430; or Pattern Makers Association of Cleveland and Vicinity; or Metal Polishers International Union, Local No. 3; or International Association of Machinists, District No. 54; or Federal Labor Union No. 18907; or any other labor organization; and (4) that the closed-shop agreement dated May 20, 1937, between the respondent and the five unions last named, and designating those unions as the exclusive representative of the respondent's employees, is void and of no effect;

(f) Notify the Regional Director for the Eighth Region, Cleveland, Ohio, in writing within ten (10) days from the date of this order what steps the respondent has taken to comply therewith.

It is further ordered that the complaint, in so far as it alleges that the respondent discriminated in regard to the hire and tenure of employment of Frank Erzen, Austin Ballard, Frank Hunek, and

William Krall, within the meaning of Section 8 (3) of the Act, be, and it hereby is, dismissed without prejudice.

And it is hereby further ordered that the complaint, in so far as it alleges that the respondent has engaged in unfair labor practices within the meaning of Section 8 (5) of the Act, be, and it hereby is, dismissed.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

DIRECTED that, as part of the investigation ordered by the Board to ascertain representatives for the purposes of collective bargaining with Electric Vacuum Cleaner Company, Inc., Cleveland, Ohio, an election by secret ballot shall be conducted at such date as the Board may in the future direct, under the direction and supervision of the Regional Director for the Eighth Region, acting in this matter as agent for the National Labor Relations Board and subject to Article III, Section 9, of said Rules and Regulations, among the production and maintenance employees of the said company who were employed by it during a pay-roll period which we shall in the future specify, excluding clerical and supervisory employees, to determine whether they desire to be represented by the American Federation of Labor or by United Electrical & Radio Workers of America, affiliated with the Committee for Industrial Organization, for the purposes of collective bargaining, or by neither.