

In the Matter of SOUTHPORT PETROLEUM COMPANY and OIL WORKERS
INTERNATIONAL UNION, LOCAL NO. 227

Cases Nos. C-477 and R-600.—Decided August 4, 1938

Oil Refining Industry—Interference, Restraint, and Coercion: expressed opposition to labor organization; discrediting union leadership; refusal to meet with outside representatives for purposes of collective bargaining—*Discrimination:* discharges: for union activity; charges of, not sustained as to one employee—*Collective Bargaining:* charges of refusal to bargain collectively, not sustained—*Reinstatement Ordered—Back Pay:* awarded—*Investigation of Representatives:* controversy concerning representation of employees—*Unit Appropriate for Collective Bargaining:* production and maintenance employees, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and supervisory employees; petition for separate unit for employees engaged in boilermaking trades: denied, interests of employees so engaged indistinguishable from interests of other production and maintenance employees—*Election Ordered*

Mr. Warren Woods, for the Board.

Mr. F. W. Fischer, of Tyler, Tex., and *Mr. Harry Dow*, of Houston, Tex., for the respondent.

Mandell & Combs, by *Mr. Arthur J. Mandell*, of Houston, Tex., for the Oil Workers.

Mr. J. N. Davis, of Kansas City, Kans., for the Brotherhood.

Mr. Warren L. Sharfman, of counsel to the Board.

DECISION

ORDER

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon charges and amended charges duly filed by Oil Workers International Union, Local No. 227, herein called the Oil Workers, the National Labor Relations Board, herein called the Board, by Edwin A. Elliott, Regional Director for the Sixteenth Region (Fort Worth, Texas), issued its complaint dated December 1, 1937, against Southport Petroleum Company,¹ Texas City, Texas, herein called

¹ Erroneously referred to in the complaint before it was amended as Southport Refinery Company.

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 National Labor Relations Act, 49 Stat. 449, herein called the Act.

On August 17, 1937, the Oil Workers also filed with the Regional Director for the Sixteenth Region a petition alleging that a question affecting commerce had arisen concerning the representation of employees of the respondent and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the Act. On November 20, 1937, the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing upon due notice. At the same time the Board issued an order pursuant to Article II, Section 10 (c) (2), and Article II, Section 37 (b), of said Rules and Regulations, consolidating the cases for purposes of hearing.

With respect to the unfair labor practices, the complaint alleged in substance that the respondent, on or after June 11, 1937, refused to bargain collectively with the Oil Workers, which represented a majority of the respondent's employees in an appropriate unit; that the respondent discharged four named employees between August 4 and October 15, 1937, because of their affiliation with and support of the Oil Workers; and that by these acts the respondent had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. The complaint and accompanying notice of hearing were duly served upon the respondent and the Oil Workers.

The respondent's answer denied that it was engaged in that commerce which was within the contemplation of the Act, and also denied the other material allegations of the complaint.

Pursuant to the notice, a hearing on both the petition and the complaint was held at Houston, Texas, from December 13 through December 17, 1937, and on January 13, 1938, before Joseph F. Kiernan, the Trial Examiner duly designated by the Board. At the hearing the International Brotherhood of Boilermakers, Iron Shipbuilders, Welders & Helpers of America, herein called the Brotherhood, moved to intervene in the representation case.² This motion was granted. The Board, the respondent, and the Oil Workers were represented by counsel and the Brotherhood by the assistant vice president, and all participated in the hearing. - Full opportunity to be heard, to

² Case No. R-600.

examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. During the course of the hearing the Trial Examiner made several rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On March 7, 1938, the Trial Examiner filed his Intermediate Report, and on March 18, 1938, a supplement thereto, in which he found that the respondent had discharged three of the four employees named in the complaint because they joined and assisted the Oil Workers. He recommended that they be reinstated with back pay. The Trial Examiner also found that the fourth employee named in the complaint was not discharged for union activity, and that the respondent had not refused to bargain collectively with representatives of its employees in an appropriate unit. On March 24, 1938, the respondent filed exceptions to the Intermediate Report.

On July 28, 1938, pursuant to permission granted by the Board, the respondent presented oral argument before the Board in support of its exceptions to the Intermediate Report. The Board has considered the exceptions to the Intermediate Report, but save for those which are consistent with the findings, conclusions, and order set forth below, finds 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

Southport Petroleum Company, a Texas corporation organized in 1932, is engaged in the business of refining crude oil and distributing gasoline, fuel oil, and gas oil. The main office and one of the respondent's refineries is located at Kilgore, Texas. The respondent also operates a refinery at Texas City, Texas, a terminal and docks at Avondale, Louisiana, some oil wells located in Texas, and some pipe lines which are used to gather oil for its refineries.

The refinery operated by the respondent at Texas City, with which we are here concerned, has a capacity of 20,000 barrels of crude oil a day. The average daily consumption is approximately 9,000 to 10,000 barrels. The respondent has a 150-acre tank farm at this refinery which has a storage capacity of 500,000 barrels. Ordinarily 300,000 to 400,000 barrels of crude oil are stored there. The refining of crude oil at Texas City is a continuous process and requires both day and night shifts of workers.

Approximately 75 per cent or more of the crude oil used by the respondent at Texas City is shipped to it in tankers coming through the Gulf of Mexico from Corpus Christi, Texas. This oil originates in the oil fields adjacent to Corpus Christi. Another portion of the crude oil used at the Texas City refinery, at times running as high as 30 per cent of the total, comes from Louisiana in the barges of the Southport Transit Company, a corporation controlled by the officers and stockholders of the respondent. The respondent also purchases a small amount of refined oil which is brought from Louisiana to Texas City, where it is canned and resold.

About 33 per cent of the total production at Texas City consists of gasoline. The remaining 66 per cent is made up of fuel oils and gas oils. The respondent sells these products through local salesmen operating in Houston, Texas, and through brokers in New York City and elsewhere. During the year 1936 the gross receipts from sales from the Texas City refinery amounted to approximately \$9,000,000. About 10 per cent of the product is shipped to Avondale, Louisiana, in barges owned by the Southport Transit Company, and sold there by the respondent. Approximately 30 per cent of the product is sold to purchasers who take delivery in trucks at Texas City. The remaining 60 per cent of the product is loaded in tankers at Texas City, the great bulk thereof being destined for States other than Texas or for foreign countries. About 50 per cent of the tankers carrying the respondent's products purchase bunker oil from the respondent which they use for their own propulsion.

The respondent has a trade-mark covering one of its brands of gasoline, which is registered with the United States Patent Office for use in commerce between the several States.

II. THE ORGANIZATIONS INVOLVED

Oil Workers International Union, Local No. 227, is a labor organization affiliated with the Committee for Industrial Organization, admitting to its membership all production and maintenance employees regularly employed by the respondent at its refinery at Texas City, Texas, exclusive of office workers and supervisory employees.

International Brotherhood of Boilermakers, Iron Shipbuilders, Welders & Helpers of America is a labor organization. It is affiliated with the American Federation of Labor and with its Building Trades, Metal Trades, and Railway Employees departments, and with the Chief Executives Association of the 21 Standard Railroad Unions. The local lodge at Houston, Texas, admits to membership boiler-makers, welders, riveters, caulkers, burners, layers-out, flangers, erectors, helpers, apprentices, etc.

III. THE UNFAIR LABOR PRACTICES

A. *The refusal to bargain collectively*

1. The appropriate unit

The Oil Workers urged as an appropriate unit all of the production and maintenance employees regularly employed by the respondent at its Texas City, Texas, refinery, exclusive of office workers and supervisory employees. The Brotherhood contends that the employees in the classifications of the boilermaking trade working for the respondent constitute an appropriate unit—that is, boilermakers, welders, caulkers, their helpers, and apprentices. The respondent maintained that the appropriate unit should consist of all of its employees at Texas City except the manager, superintendent, and assistant superintendent.

In accordance with our usual practice, where no labor organization desires to represent the office workers, salesmen, chemists, and supervisory employees, we shall exclude them from the appropriate bargaining unit because of the dissimilarity between their interests and those of the production employees.

Neither the Oil Workers nor the Brotherhood admits to its membership the special watchman or the truck drivers who are hired with their own trucks by the respondent. The Oil Workers exclude the special watchmen from membership because they are temporary employees hired for special purposes. The Oil Workers exclude truck drivers who are hired with their own trucks from membership because they are looked upon as independent contractors. We find that there is a diversity in the interests of the regular production and maintenance employees and the interests of the special watchmen and the truck drivers who are hired with their own trucks. We shall exclude the two latter classes from the appropriate unit.

The Brotherhood contended that the boilermakers, welders, caulkers, their helpers, and the apprentices to these crafts, constitute an appropriate unit. It based its contention on the Board's decision in *Matter of Gulf Oil Corporation and International Brotherhood of Boilermakers, Iron Shipbuilders, Welders & Helpers of America*.³ In that case, in determining that the unit advocated by the Brotherhood was an appropriate one, we said,

Wherever possible, it is obviously desirable that, in the determination of the appropriate unit, we render collective bargaining of the Company's employees an immediate possibility. In the instant proceeding the record clearly indicates that a majority of the boilermaking employees at the Port Arthur refin-

³ 4 N. L. R. B. 133.

ery have authorized the Boilermakers to act as their bargaining agent and that that labor organization has for the past four or five years been recognized by the Company as the representative of its members. On the other hand, there is no evidence that the majority of the other employees at the refinery belong to any union whatsoever; nor has any labor organization petitioned the Board for certification as representative of the refinery employees on a plant-wide basis. Consequently, even if the boilermaking employees do not constitute the most effective bargaining unit, as the Oil Workers contend, nevertheless, in the existing circumstances, unless they are recognized as a separate unit, there will be no collective bargaining agent whatsoever for these workers, who for years have actually engaged in collective bargaining with the Company.

The reasons motivating our determination of an appropriate unit consisting of the boilermaking and welding department in the *Gulf Oil* case, as urged by the Brotherhood, are not present here. While there is evidence in the record indicating that the boilermakers, welders, caulkers, and their helpers, employed by the respondent at Texas City, desire to be represented by the Brotherhood, the Brotherhood, has never bargained with the respondent for them, as was true in the *Gulf Oil* case. In fact the Brotherhood had never approached the respondent for any purpose up to the time of the hearing. Moreover, in the present case there is evidence that a majority of the employees at the refinery desire to be represented by the Oil Workers, and the Oil Workers have, since June 1937, attempted to deal with the respondent, and have petitioned the Board for certification as representative of the employees on a plant-wide basis. It is apparent that the rejection of the unit contended for by the Brotherhood will not act as a deterrent to collective bargaining, as would have been true in the *Gulf Oil* case.

Specifically, the Brotherhood's claim is that there are 18 persons employed by the respondent at the boilermaking trade, and that persons so employed constitute an appropriate unit. In support of its claim to represent the employees in such unit the Brotherhood introduced a petition signed by 17 of the 18 persons alleged to be working at the boilermaking trade. The pay-roll records of the respondent list 10 of the 17 employees who signed the Brotherhood's petition as laborers, and there is no showing that the employees which the Brotherhood claims are engaged in the boilermaking trades are actually working at boilermaking or any other operation identified with the boilermaking trade. The Brotherhood has in effect requested that certain individuals be designated as an appropriate bargaining unit. These individuals, however, are not so engaged in

the boilermaking trade as to give them an identity of interests clearly distinguishable from the interests of the other employees, which we generally associate with and find in a craft unit. The Brotherhood has not requested a unit which can be termed appropriate for the purposes of collective bargaining. We will therefore include the employees signing the Brotherhood's petition within the larger unit.

We find that the production and maintenance employees regularly employed by the respondent at Texas City, Texas, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and supervisory employees, constitute a unit appropriate for the purposes of collective bargaining and that said unit will insure to employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

2. Representation by the Oil Workers of the majority in the appropriate unit

The respondent employed between 220 and 230 persons in the appropriate unit during the period from July 1 to December 1, 1937, and 223 persons during the pay-roll period ending November 30, 1937. On June 4, 1937, the Oil Workers informed the respondent that it represented a majority of the employees in such unit and at all times thereafter continued to assert this claim.

The secretary of the Oil Workers brought to the hearing 144 membership cards in the Oil Workers, which were signed, he testified, by employees of the respondent. The Oil Workers refused to introduce the cards in evidence and thereby divulge the names of its members to the respondent. As a result it is impossible to ascertain when the cards were signed, or whether or not the signatures are genuine. Nor is it possible to determine whether or not the employees signing them are within the unit which we have found to be appropriate. Moreover, 34 employees advised La Ferney, the manager of the Texas City refinery, during the months preceding the hearing that they no longer desired to be represented by the Oil Workers, and that they had discontinued their membership in the Oil Workers.

On the record before us, we cannot find that on June 4, 1937, or at any time thereafter the Oil Workers represented a majority of the persons employed by the respondent in the unit which we have found to be appropriate for purposes of collective bargaining. We find that the respondent has not refused to bargain collectively with the representative of its employees in an appropriate unit.

We will order that the complaint be dismissed in so far as it alleges that the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

B. The discriminatory discharges

The complaint alleged that the respondent discharged William Cornish, Earl Gooch, Edward A. Patricio, and E. D. Richey because they joined and assisted the Oil Workers. The respondent's answer admitted the discharges, but alleged that they were made for incompetency, insubordination, and because of a lack of work.

The alleged discriminatory discharges must be viewed in the light of certain circumstances which reflect the attitude of the respondent toward the organization of its employees. In the spring of 1937, just after the respondent had given its employees an increase in wages, Lee La Ferney, the manager of the Texas City refinery, addressed all of the employees at a meeting at noon, and told them, among other things, that there were outside interests at work in the plant and that the employees should be careful as they only wanted the employees' money. This occurred at a time when the Oil Workers had organized a substantial number of the respondent's employees. In June La Ferney expressed his position to William Cornish more clearly. According to Cornish's testimony, La Ferney said that he was not against labor organization, "but if we knew what he knows about the executives of the organization we were in, we would get out guns and go after them." La Ferney went on to explain that he would like to see a union of the men in the plant, without any outside executives. La Ferney maintained this position when the Oil Workers attempted to negotiate with the respondent during the succeeding months. These statements were calculated to have an added effect upon the men because, as La Ferney pointed out in his spring speech, he had once been organizer for the International Association of Oil Field, Gas Well, and Refinery Workers, the predecessor to the Oil Workers.

On October 8, 1937, Earl Gooch, who had been discharged from the Texas City refinery in August, talked to M. M. Travis, the secretary of the respondent, at Kilgore, Texas. Travis told Gooch, "Don't let outside activities interfere with your work and your efficiency, because Mr. Lewis will look after himself, and it is up to you to look after yourself."

Early in the fall G. Tate, the chief chemist, handed Foy Hopkins, one of his subordinates and a member of the Oil Workers, a copy of an Oil Workers' publication entitled *Things . . . Every Oil Worker Should Know*. Tate had crossed out the word "Things" in the title, and had written underneath the remainder of the title, "Enough to take care of his job and let the other fellow do likewise."

Keeping in mind the attitude of the respondent toward the Oil Workers, as expressed by the actions of some of its supervisory employees noted above, we turn to a consideration of the circumstances surrounding the discharge of each of the employees involved.

E. D. Richey. E. D. Richey was employed by the respondent as a boiler repairman from December 1935 until he was discharged on October 15, 1937. During the course of his employment he received three raises in pay, the last one, fixing his pay at 85 cents an hour, about 4 or 5 months before his discharge. No complaints were ever registered against his work, and it was always passed by the State Boiler Inspector.

Richey joined the Oil Workers in June 1937. He was active on its behalf, and frequently wore his button at the plant. On September 20, 1937, he was elected steward of the Oil Workers. Prior to his discharge he was a member of the Organizing Committee of the Oil Workers.

V. Q. Davis, Richey's brother-in-law and foreman, discharged him on October 15, for coming on the job intoxicated. Davis explained that Richey came to the refinery intoxicated on a Wednesday night and failed to do his work. Thursday Davis secured authority from Hinds, the superintendent, to discharge Richey. However, Davis did not discharge Richey on Thursday, and his work was satisfactory. Davis testified that Friday night Richey was intoxicated again and failed to perform his duties, and that on Saturday he discharged him. Richey admitted that Davis had spoken to him at home and told him that if he did not stop running around to the saloons he would be discharged, but testified that he never drank on the job and never came to work intoxicated. J. C. Greathouse, who worked alongside of Richey on certain shifts, testified that he had never seen Richey drinking at the refinery and had never seen him drunk during working hours. H. B. Hilliard, another employee, testified that he saw and talked to Richey the last night that he was employed, and that Richey was working that Friday night and was not intoxicated.

After his discharge Richey spoke to both Hinds and Davis, each of whom indicated that the other had been responsible for his discharge. Upon request Davis gave Richey a recommendation on the respondent's letterhead which read as follows:

OCT. 18, 1937.

To whom it may concern:

Mr. E. D. Richey was employed at our plant as a boiler maker since December 26, 1935. His work was satisfactory. We or I, the undersigned, unhesitatingly recommend him for such work.

V. Q. DAVIS, *Forman Engineer.*

We find from all of the evidence that Richey was not intoxicated while working for the respondent on the three nights prior to his discharge. We also find that he was discharged because he joined and assisted the Oil Workers, and that by such discharge the re-

spondent has discriminated in regard to his hire and tenure of employment, and has thereby discouraged membership in the Oil Workers. We further find that by such action the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed under Section 7 of the Act.

Prior to his discharge Richey earned 85 cents an hour, and worked 8 hours a day, 5 days a week. He earned \$3.36 from the time of his discharge up to the time of the hearing. He desires to be reinstated.

William Cornish. William Cornish was hired by the respondent at the Texas City refinery as an electrician on June 24, 1935, and remained in that capacity until he was discharged on August 4, 1937. Even after his discharge J. C. Hinds, the superintendent, characterized him as a good electrician.

Cornish joined the Oil Workers about June 1936. As a member of the Organizing Committee he was one of its most active members. In March 1937 he was made a member of the Workmen's Committee which was formed to bargain with the respondent for the Oil Workers. In this capacity Cornish had several conferences with La Ferney. In July Cornish was elected vice president of the Oil Workers. Less than a month later he was discharged.

Superintendent Hinds stated that he discharged Cornish "for continually leaving the job without informing anyone where he was going or why." Cornish was paid a monthly salary, and worked 6 days a week. He was free to choose the day of the week he was to take off. Hinds testified that Cornish was required to notify him what day he would not report for work. Cornish testified that he had been told to notify his fellow workers rather than Hinds, and that he always told Meadows, his helper. Meadows testified that he had always received such notification from Cornish. Hinds and Smith, the assistant superintendent, testified, however, that on several occasions they had warned Cornish about going off the job without informing his superiors. Cornish denied having received such warnings. In any event no disciplinary action was ever taken.

During the month of July Cornish was having an extensive amount of dental work done. On Friday, July 30, he had an appointment to visit his dentist. On Thursday, July 29, the dentist called the refinery and left word with La Ferney that he could not see Cornish on Friday, but that he would see him on Tuesday, August 3. La Ferney delivered the message to Cornish. Cornish worked on Friday, but went to the dentist on Tuesday. On Monday Cornish told Meadows he would not report for work on Tuesday. The dentist did not finish with Cornish on Tuesday, and Cornish went back to see him on Wednesday. As a result he came to work between

9:30 and 10 o'clock on Wednesday morning although he should have been there at 7 o'clock. Cornish telephoned Meadows on Wednesday morning and reported that he would be in late. Shortly after he came to work Hinds discharged him.

A. R. Quinn replaced Cornish. Quinn had applied to La Ferney for a job on Monday, August 2, at which time La Ferney told him there was going to be a change and that he would keep him in mind. On August 4, after Cornish had been discharged, La Ferney called Quinn, who started to work for the respondent on August 5.

We find that William Cornish was discharged because of his activity on behalf of the Oil Workers, and that by such discharge the respondent has discriminated in regard to his hire and tenure of employment, and has thereby discouraged membership in the Oil Workers. We also find that by such action the respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed under Section 7 of the Act.

Prior to his discharge Cornish earned \$185 a month, working 8 hours a day, 6 days a week. After his discharge, Cornish was unable to get a job until September 7, when he was hired as a Frigidaire serviceman. Cornish earned \$369 on that job up to December 1. He desires reinstatement.

Earl Gooch. Earl Gooch was employed by the respondent for 4½ years, at the Texas City refinery for the past 2½ years. Prior to the termination of his employment on August 4 he was working as a welder. Gooch received several wage increases while working for the respondent, the last increase, which came about a month before his discharge, fixing his pay at 90 cents an hour. No complaints were ever made about his work.

Gooch joined the Oil Workers in February 1937. About May 1 he was elected acting secretary and as a member of the Organizing Committee was one of the most active members of the Oil Workers.

On August 4, the same day that William Cornish was discharged, Hinds told Gooch he was being permanently transferred to the respondent's refinery at Kilgore. Gooch obtained an advance for travel expenses and proceeded to Kilgore, where he was put to work for an independent contractor named Ulmer, who was doing some construction work for the respondent at the Kilgore refinery. Early in October when Gooch's work with Ulmer was completed he talked with M. M. Travis, the secretary of the respondent in regard to further work. Travis, after indicating to Gooch that union activity was impairing his efficiency, told him that the respondent had no more work for him at Texas City, and that he had only been called to Kilgore because there was work available for him with Ulmer. Gooch, although ostensibly transferred to the respondent's Kilgore refinery on August 4, was, in fact, discharged on August 4.

Just before Gooch was sent to Kilgore, the respondent transferred another welder, Grady Suttles, from Kilgore to Texas City. Gooch was discharged because, with Suttles working at Texas City, there was not enough work for him to do. Travis, the secretary of the respondent, was the only witness to testify as to the reasons for the transfer of Suttles, and he admitted that his knowledge was obtained from other officers of the respondent after the transfer. He first stated that Suttles was transferred to Texas City because he was desirous of making the change due to illness in his family. Subsequently, he indicated that the respondent transferred Suttles because Gooch was not capable of working on pressure units and because Suttles was senior in service to Gooch. The recognition by the respondent of the difference in capabilities of the two men was expressed by the payment of \$1.05 per hour to Suttles and 90 cents per hour to Gooch. However, Gooch had welded both flat work and pressure units for the respondent, and when Travis called the Texas City refinery for "expert welders" to work for Ulmer at Kilgore, Hinds sent him Gooch. Moreover, after his discharge Gooch obtained a temporary job as a welder with the Sinclair Refining Company. A. Mochel, the welding foreman at the Sinclair Refining Company, testified that to get the job Gooch took a competitive examination, and was 1 of 5 out of 15 who were hired. He also testified that Gooch's work was satisfactory even on pressure units. Sinclair Refining Company paid Gooch \$1.15 an hour. While the respondent has differentiated in the hourly rates of Suttles and Gooch it has not differentiated in the type of welding that they were assigned to do, and Gooch was in fact able to weld pressure units. Although the respondent's classification of Gooch and its opinion of his capabilities are entitled to great weight, the evidence impels us to the conclusion that the respondent's actions cannot be ascribed to the reasons it here offers. We cannot accept the respondent's contention that Suttles' transfer which resulted in Gooch's discharge was made because Gooch was not a good welder capable of welding pressure units.

The respondent also contends that Suttles was properly allowed to replace Gooch because he was senior in service to him. In this connection it should be noted that Suttles' seniority was determined on an employer basis; that there was no evidence to show that the respondent had customarily adopted an employer seniority rule in its two refineries which were over 200 miles apart; and that Gooch was senior in service at the Texas City refinery. In any event there is no affirmative showing that the respondent was aware of or considered the fact that Suttles was senior to Gooch on an employer basis at the time the transfer was made. We are constrained to

reject the respondent's contention that Suttles' transfer to Texas City and the resultant displacement of Gooch was proper because of Suttles' seniority.

On August 4, at the time Gooch was discharged because Suttles' presence in Texas City created an excess of welders, Jack Wilson, another welder, was retained in the respondent's employ at Texas City. Gooch was senior in service to Wilson. Wilson, like Suttles, received \$1.05 an hour, but his work was similar to that performed by Gooch. If the respondent properly followed seniority in allowing Suttles to transfer to Texas City, thus necessitating the dismissal of a Texas City welder, then it obviously discriminated against Gooch thereafter by dismissing him while retaining Wilson, who was junior in service to him, in its employ.

We find that Earl Gooch was discharged because he joined and assisted the Oil Workers, and that by such discharge the respondent has discriminated in regard to his hire and tenure of employment, and has thereby discouraged membership in the Oil Workers. We also find that by such action the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed under Section 7 of the Act.

Prior to his discharge Gooch earned 90 cents an hour, working 40 hours a week. From August 5 to October 8 he earned \$369 working for the Ulmer Pipe Line Co. Thereafter, he also earned \$141.20 working for the Sinclair Refining Company prior to the hearing. He desires to be reinstated.

E. A. Patricio. Patricio was employed by the respondent for 18 months prior to his discharge on August 13, 1937. He worked as a truck loader 4 days a week and as a manifest clerk 1 day a week. The record shows that his work was satisfactory.

Patricio was a member of the Oil Workers and wore his button at the plant occasionally. He talked to some of the other employees about joining the Oil Workers, but was not an officer of the Oil Workers or a member of any of its committees.

Patricio was discharged after having been accused of writing derogatory remarks about La Ferney on the walls of the lavatory. Before discharging Patricio the respondent attempted to prove that he had been responsible for the writing in question. After the investigation La Ferney said to Patricio, "I am not quite convinced it is your writing, but I have heard you have said things about me, and that you were not satisfied out here, so therefore I am going to have to let you go."

The Trial Examiner found that Patricio was not discharged because of his membership in and activity on behalf of the Oil Workers. The Oil Workers did not except to the finding of the Trial Examiner.

Upon the evidence before us we find that Patricio was not discharged because of his membership in the Oil Workers. We will order that the complaint be dismissed with respect to him.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III above, occurring in connection with the 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 shall order the respondent to make the discharged employees whole for any loss of pay they have suffered by reason of their respective discharges by payment to each of them of a sum equal to the amount which he normally would have earned as wages from the date of his discharge to the date of the offer of reinstatement, less his net earnings⁴ during said period.

VI. THE QUESTION CONCERNING REPRESENTATION

On June 4, 1937, the Oil Workers wrote to the respondent stating that it represented a majority of the respondent's employees and asking that a date be set for collective bargaining. Similar requests were made by the Oil Workers on a number of different occasions during the succeeding months. The respondent refused to meet and negotiate with the Oil Workers because it claimed that it was not subject to the Act, and that the Oil Workers did not represent a majority of its employees.

We find that a question has arisen concerning 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

⁴ By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers, Local No 2590*, 8 N L R. B. 440.

tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VIII. THE DETERMINATION OF REPRESENTATIVES

In Section III-A-2 above, we examined the evidence introduced by the Oil Workers to show that it represented a majority of the employees in the unit which we have found to be appropriate in Section III-A-1, above, and concluded that it was insufficient to establish the fact that the Oil Workers represented a majority of the employees in such unit. We find that the question concerning representation which has arisen can best be resolved by means of an election by secret ballot.

As the petition requesting an investigation and certification of representatives was filed almost a year ago, we will not follow our usual practice of limiting eligibility to vote to persons in the employ of the respondent at the time such petition was filed, but will provide that those persons employed by the respondent in the appropriate unit during the pay-roll period next preceding the date of the issuance of this Decision and Direction of Election, and those ordered reinstated by this Decision, shall be eligible to vote, excluding those who have since quit or been discharged for cause.

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. Oil Workers International Union, Local No. 227, is a labor organization, 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 William Cornish, E. D. Richey, and Earl Gooch, and thereby discouraging membership in Oil Workers International Union, Local No. 227, has engaged 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 in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

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

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

6. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act, with respect to the discharge of E. A. Patricio.

7. A question affecting commerce has arisen concerning the representation of employees of Southport Petroleum Company, Texas City, Texas, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

8. The regular production and maintenance employees of the respondent, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and supervisory employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations 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, Southport Petroleum Company, Texas City, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or 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.

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

(a) Offer to William Cornish, E. D. Richey, and Earl Gooch immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

(b) Make whole William Cornish, E. D. Richey, and Earl Gooch for any loss of pay they have suffered by reason of their discharge by payment to each of them, respectively, of a sum of money equal to that which he would normally have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less the net earnings of each, respectively, during said period;

(c) Post immediately notices in conspicuous places at its Texas City, Texas, refinery, stating that the respondent will cease and desist in the manner aforesaid, and maintain said notices for a period of thirty (30) consecutive days from the date of posting;

(d) Notify the Regional Director for the Sixteenth Region 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 be, and it hereby is, dismissed 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, and in so far as the allegations of the complaint relate to E. A. Patricio.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

DIRECTED that, as part of the investigation authorized by the Board to ascertain representatives for collective bargaining with Southport Petroleum Company, Texas City, Texas, an election by secret ballot shall be conducted within fifteen (15) days from the date of this Direction, under the direction and supervision of the Regional Director for the Sixteenth Region, acting in the matter as agent for the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among the regular production and maintenance employees who were employed by Southport Petroleum Company at its Texas City, Texas, refinery, at any time during the pay-roll period next preceding the date of the issuance of this Direction of Election, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and supervisory employees, and those employees who quit the employ of the respondent or were discharged for cause between such date and the date of election, but including those employees whose reinstatement was ordered by the above order, to determine whether or not they desire to be represented by Oil Workers International Union, Local No. 227, for purposes of collective bargaining.

[SAME TITLE]

AMENDMENT TO DIRECTION OF ELECTION

August 10, 1938

On August 4, 1938, the National Labor Relations Board, herein called the Board, issued a Direction of Election in the above-entitled proceeding, the election to be held within fifteen (15) days from the

date of Direction, under the direction and supervision of the Regional Director for the Sixteenth Region. The Board, having been advised that an election at this time would not settle the question concerning representation which has arisen, hereby amends the Direction of Election issued on August 4, 1938, by striking therefrom the words, "within fifteen (15) days from the date of this Direction," and substituting therefor the words, "within a period to be determined hereafter by the Board."

8 N L. R. B., No. 93a.