

In the Matter of PRECISION CASTINGS COMPANY, INC. and IRON
MOLDERS UNION OF NORTH AMERICA, LOCAL 80

Case No. C-416.—Decided August 11, 1938

Metal Products Manufacturing Industry—Interference, Restraint, or Coercion—Discrimination: discharge; charges of, sustained as to six, and dismissed as to two, employees—*Remstatement Ordered:* as to one employee discriminatorily discharged who had not obtained substantially equivalent employment; not ordered as to one employee discriminatorily discharged who was offered but refused reinstatement—*Back Pay:* awarded to all employees discriminatorily discharged, including period during strike, since plant continued in operation—*“Net Earnings”:* no deduction in computing, for expenses incurred in connection with obtaining regular and substantially equivalent employment elsewhere.

Mr. Peter J. Crotty, for the Board.

Hiscock, Cowie, Bruce & Lee, by *Mr. H. Duane Bruce* and *Mr. Matthew R. Quinn*, of Syracuse, N. Y., for the respondent.

Mr. Dennis Keefe, of Cincinnati, Ohio, for the Union.

Mr. Arnold R. Cutler, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges duly filed in behalf of International Molders Union of North America, Local 80,¹ herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Third Region (Buffalo, New York), issued its complaint dated December 20, 1935, against Precision Castings Company, Inc., a corporation, Fayetteville, New York, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. A copy of the complaint and a notice of hearing were duly served upon the respondent and upon the Union.

¹ Before 1903, International Molders Union of North America was known as Iron Molders Union of North America, and at times has been so referred to. The charge filed by Local 80 uses the latter name.

The complaint alleged in substance that during July and August 1935 the respondent discharged 24 named persons² employed at its Fayetteville plant, for the reason that they and each of them joined and assisted the Union, thereby discriminating in regard to the tenure of employment of said persons and discouraging membership in the Union; that in and by said discharges the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act; that on August 9, 1935, and thereafter, the respondent refused to bargain collectively with the Union as the representative of the employees in the foundry department of said plant although a majority of said employees had designated the Union their representative for such purpose within a unit appropriate therefor. On January 2, 1936, the respondent appeared specially and moved to dismiss the complaint on the ground that the Board lacked jurisdiction of the subject matter. It also filed an answer denying the material allegations of the complaint.

On said January 2 the respondent instituted suit in the District Court of the United States for the Western District of New York to enjoin the Board and its agents from prosecuting further this proceeding. A temporary restraining order was granted. On March 25 the Court dissolved the order and entered a decree dismissing the suit for want of equity.³ On July 13, 1936, the decree was affirmed by the Circuit Court of Appeals for the Second Circuit.⁴

Thereafter, on November 19, 1937, notice of a hearing to be held on the allegations of the complaint, accompanied by a copy of the complaint, was duly served upon the respondent and upon the Union. On November 29 the respondent filed an additional answer in which it denied again the material averments of the complaint and alleged as a separate and affirmative defense, want of jurisdiction of the subject matter and unconstitutionality of the Act as applied to it.

Pursuant to notice and amended notice, a hearing was held at Syracuse, New York, on November 29, 30, and December 1, 1937, before William P. Webb, the Trial Examiner duly designated by the Board. The Board and the respondent were represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues was afforded all parties.

² The names of these persons as set forth in the complaint are as follows: Adam Albamse, W. Brakefield, F. Davy, H. Ellis, Thomas Ganley, Clarence Goodmore, A. Hughson, L. Hughson, Perl Jones, F. Ken Knight, C. McGinley, Earl Millis, W. Morey, Leo Nash, Clifford Nellis, P. Ricor, A. Shaw, James Shoemaker, Ralph B. Smith, K. Sutfin, M. Van Dvozer, H. Wilbur, M. Wilbur, and R. Yager.

³ *Precision Castings Co., Inc. v. Boland et al.*, 13 F. Supp. 877. See *Myers et al. v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

⁴ *Precision Castings Co., Inc. v. Boland et al.*, 85 F. (2d) 15.

At the commencement of the hearing counsel for the respondent renewed its motion of January 2, 1936, which motion the Trial Examiner denied. During the hearing counsel for the Board, acting on behalf of the Regional Director, moved that the allegations of the complaint in respect to the refusal of the respondent to bargain collectively with the Union be dismissed, for the reason that since the issuance of the complaint the Union no longer represented a majority of the workers in the foundry department at the Fayetteville plant. He also moved, on behalf of the Regional Director, to dismiss the complaint, without prejudice, in regard to 16 of the employees⁶ alleged to have been discriminatorily discharged, on the ground, among others, of their unavailability, apparently because of the lapse of time since the complaint had issued. The Trial Examiner granted both these motions. He also granted a motion made by counsel for the Board that the pleadings be conformed to the proof. Other motions by counsel for the respondent and the Board and objections to the admission and exclusion of evidence were ruled upon by the Trial Examiner.

The Board has reviewed the rulings of the Trial Examiner on motions and upon objections to the admission and exclusion of evidence and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On February 16, 1938, the Trial Examiner filed an Intermediate Report, copies of which were duly served on all parties, finding that the respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act, and recommending that the respondent cease and desist therefrom and take certain affirmative action to remedy the situation brought about by the unfair labor practices. On February 23 the respondent filed exceptions to the Intermediate Report and requested oral argument before the Board.

Pursuant to notice, a hearing for the purpose of oral argument was held before the Board on March 29, 1938, in Washington, D. C. The respondent and the Union were represented and participated in the oral argument. A brief in support of its case was submitted by the respondent.

The Board has reviewed the exceptions to the Intermediate Report, and, in so far as they are inconsistent with the findings, conclusions, and order set forth below, finds them without merit.

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

⁶ The persons with respect to whom the charges were withdrawn were as follows: Adam Albamse (Allen Albanese), W. Brakefield, H. Ellis, Clarence Goodmore, A. Hughson, L. Hughson, F. Ken Knight, C. McGinley, W. Morey, P. Ricor, A. Shaw, James Shoemaker (James Schumaker), Ralph B. Smith (Ralph Smith), K. Sutfin (K. Sutphen), M. Van Dvozer (N. Van Dooser), and R. Yager (R. Yaeger).

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent owns and operates a plant at Fayetteville, New York, where die castings are manufactured, and has other plants at Syracuse, New York, and Cleveland, Ohio. This proceeding is concerned only with the plant at Fayetteville.

The respondent uses in the course of its operations at Fayetteville large quantities of raw materials, chiefly zinc, aluminum, copper, and silicon. In the year preceding August 31, 1935, the aggregate value of raw materials used was approximately \$400,000, and similar amounts are being used at the present. The record shows that about 75 per cent of these raw materials are regularly shipped to the Fayetteville plant from points outside of the State of New York. In the same annual period preceding August 31, 1935, approximately \$1,200,000 of finished goods were produced at the plant. About 70 per cent of these were shipped out of the State of New York to customers located in various States including Michigan, Connecticut, Pennsylvania, Ohio, and Indiana.

During July and August 1935, the foundry department of the plant employed from 75 to 95 workers.⁶

II. THE ORGANIZATION INVOLVED

International Molders Union of North America, Local 80, is a labor organization affiliated with the American Federation of Labor. It admits to membership all employees working in the foundry department of the Fayetteville plant.

III. THE UNFAIR LABOR PRACTICES

A. Background of the unfair labor practices

In 1933 some organizational activity was begun among the respondent's employees at Fayetteville. At that time the respondent posted a notice on the plant bulletin board, signed by its vice president, Knapp, which stated the following:

For some time past I have advised our people along lines which I have honestly and do honestly believe to be best for all of us. I trust that you will not be led into error by outsiders.

By "outsiders" the respondent meant outside union organizers. In the following year Knapp organized a "shop committee" to represent the employees on work grievances.

⁶ At the present time the total number of employees in the Fayetteville plant is approximately 450, the respondent employing about 750 workers in all its plants.

The notice posted in 1933 manifests the respondent's distaste for unions. The formation by its vice president thereafter of an employee shop committee was consistent with its purpose to keep out "outsiders." In this the respondent has been singularly successful. For, except during the period discussed below, and excluding a few machinists who were members of a machinists' union, no outside labor organization has been successful in maintaining for long its membership and existence at the plant.⁷

B. *The discharges.*

In early July 1935, organizational activities took on new life at the plant with the solicitation by the Union of members among the employees in the foundry department. Several union meetings for the employees were held. On July 19, at the second of the meetings, 45 joined. A union shop committee, consisting of Leo Nash, James Schumaker, and Perl Jones, was set up to handle grievances.

During this period the respondent, through one of its foremen, sought to secure information as to the employees' union activities. On the night of the second union meeting, after the meeting had concluded, the foreman of the foundry department, one Bex, went to the home of a member of the shop committee, Jones, and interrogated Jones concerning his joining the Union. Bex asked the names of the employees who had attended the meeting. Jones told him. Bex then advised Jones to get out of the Union, saying that all the Union wanted was his money. In the succeeding week, apparently after another union meeting, Bex again went to Jones' house and asked questions similar to those he had asked the previous week. Jones told Bex the names of the employees who had attended.

Earl Millis was employed at the plant for more than 11 years. He had worked as an operator in the foundry department until he suffered the loss of several fingers in an industrial accident, after which he was employed as a trucker of castings in the same department. Millis joined the Union on July 19 at the second union meeting.

On July 26, 1935, about the same time that Bex, the foreman, repeated his visit to Jones' home, Bex gave Millis his pay envelope and told him that he, Millis, was "all through." Bex denied knowledge of the reason for the dismissal and Millis went to see the superintendent of the foundry department, one Ogden. Ogden inquired whether Bex had given Millis a certain slip. Millis answered in the negative. Ogden then told Millis to call Bex and the union shop committee to

⁷ While actions of the respondent occurring before the effective date of the Act do not constitute unfair labor practices, they are important, nevertheless, as lending color to and explaining the respondent's acts after that date. See *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. (2d) 134 (C C A 4), cert den. 58 S Ct 55.

his office. When Bex, Nash, Jones, and Schumaker had assembled, Ogden asked Bex for the slip and proceeded to read its contents aloud to Millis in the presence of the others. The slip was a sheet of the respondent's stationery, was signed by Ogden, and bore the date July 26, 1935. It stated:

Pay Earl Millis in full to-night. The charge against him is talking too much about labor troubles around the plant. We have warned Millis about this several times. So get his pay in full from Morgan and let him out to-night.

Millis testified, and the record is corroborative, that Ogden said, "Your services are no longer required on account of too much union activities." Millis asked Ogden, "Why pick on me because I joined the Union?" Ogden replied that the only thing he, Ogden, knew about the matter was that the order had come from the main office to write the slip out and either put it in Millis' pay envelope or hand it to him. The shop committee, through Nash, then advised Ogden that an employee could not be discharged for joining a union. Thereupon Ogden directed Millis to report back to work.

When Millis reported, Bex, the foreman, told him he would have to wait a few days before being reinstated. On July 31, Millis was given a different job "filling pots with runners." On the following day, August 1, 1935, Millis again was discharged by Bex on Ogden's orders.

The respondent contends in its brief and urged at the oral argument that Ogden had prepared and delivered to Millis the above-described discharge slip as a spiteful act, that Ogden then knew that the respondent had determined not to renew its contract of employment with Ogden. The respondent in its brief also questions whether the language of the note had reference to Millis' joining and assisting the Union. In this the respondent's contentions lack consistency. If, as the respondent states, Ogden, for the purpose of committing a spiteful act, gave Millis a slip intended to be interpreted as discharging him for union affiliation and activities, the respondent hardly can argue with equal force that the language of the slip should be given a contrary construction. We are satisfied in the light of the surrounding circumstances that the slip was intended by the respondent, and so was understood by all concerned, as discharging Millis for his activities in the Union. The respondent is in no position to disavow the acts of its superintendent in this respect.⁸

At the hearing the respondent took the position that Millis' first discharge on July 26 and his second on August 1 were each induced by reasons other than his union activities. Considerable of its proof

⁸ *National Labor Relations Board v The A S Abell Company*, 4 Cir. 97 F (2d) 951, decided July 14, 1938

related to the first discharge. While at the time this discharge occurred the only explanation given Millis, as heretofore set forth, was his union activities, witnesses for the respondent testified to other grounds. Knapp, the vice president, stated that he first observed Millis in July 1935 when Millis sought a loan to purchase a radio as a graduation gift for his daughter; that Ogden thought the purchase extravagant and he, Knapp, refused to make the loan; that Knapp then discovered that Millis spent time "in almost every other department aside from the ones where he was supposed to be, usually visiting with someone; in fact always visiting with someone"; that further investigation revealed that for 2 or 3 months preceding July, Millis had not been a good workman, "had been in a great deal of trouble with other workers, with his foreman, and that he was surly, blasphemous and foul mouthed"; that Knapp then ordered Ogden to discharge Millis. Bex, the foreman, testified that Millis had engaged in five fights at the plant; that Bex had not seen any of them; that they had occurred before the time Millis lost his fingers in 1932 although some may have taken place since; that he, Bex, had had complaints about Millis for 5 or 6 years; that the witness had not reported any of these complaints to his superiors; that he had never recommended Millis' discharge although he had authority to do so. Two subforemen, Laird and Goodfellow, testified to having had arguments with Millis about work, and Goodfellow, to Millis' use of improper language. Laird stated, however, that he was not Millis' foreman, that Millis was not expected to take orders from him, and there is doubt whether Goodfellow's claimed authority over Millis was any different. Waga, an employee, testified that Millis had suggested on two or three occasions that they both slow down in their work in order that each of them might have more to do.

We are not satisfied that the above matters testified to by the respondent's witnesses were in fact causes of Millis' first discharge, nor of his second. There is no evidence to substantiate Knapp's claim that Millis improperly visited other departments. His duties as trucker necessitated his moving about. It was his job to take the castings from the pit to the inspection department and to truck the runners and screws either to the machines or to the metal room. Nor does the record establish that Millis was incompetent. He had been in the respondent's employ for 11 years; his foreman, Bex, had never reported a complaint or recommended his discharge; and, in so far as any slowing in the movement of the castings was concerned, Knapp admitted on cross-examination that that was "not necessarily [Millis'] fault at all." Jones, a fellow employee, testified, and we are convinced, that Millis was competent in his work. With respect to trouble with other employees, Millis denied ever having had any. The

only proof along this line by the respondent was Bex's statement concerning the five fights. However, this testimony was unsatisfactory in character and, if believed, apparently related to events occurring 3 years before the discharge. The remaining matters, that Millis was "surly, blasphemous and foul mouthed," that he had arguments with the two subforemen, and that he suggested to Waga a diminution in work, lose force in view of the fact that during the many years of Millis' service the respondent evidently experienced none of these difficulties with Millis which it claims confronted it in July 1935. There is no showing that Millis was arrogant toward the persons from whom he received his orders, Knapp, Ogden, and Bex. Knapp admitted that he only heard Millis use profane language on not more than two occasions, and the record indicates that strong language was not uncommon in the foundry department. Millis denied the statements attributed to him by Waga, and testified that some 2 months before the discharge he had complained to Waga about the amount of work. Millis' version is clear and plausible, and is entitled to credence.

As above stated, after Millis' first discharge on July 26 he was reemployed on July 31 at other work and then dismissed the following day. Bex testified that Millis was discharged a second time because he spent all day leaning against a screen, once in a while doing a little work. At the hearing Millis denied that he had idled and testified that the work to which he was assigned, filling pots with runners, required him to stand away from the machine part of the time "when it was shooting," and that only on such occasions had he leaned against the screen. We are of the opinion that Millis' denial of idling warrants belief. Bex's activities in twice seeking information concerning the Union from Jones in the week of Millis' discharge, as well as the general character of his testimony above referred to, cast serious doubt on Bex's credibility as a witness.

In the light of the foregoing facts and upon the record we are convinced that the respondent undertook to discharge Millis on July 26, and did discharge him on August 1, 1935, because of his union affiliation and activities. In previous years the respondent had pursued a course of open hostility toward the organization of its employees by "outsiders." Millis' first discharge occurred in the midst of the campaign of the Union in July to organize the employees in the foundry department. That the respondent had not receded from its anti-union position is clear from the prompt investigation made by Bex in connection with his visits to Jones' home. The discharge slip was not the result of an official's spite, as the respondent would have it supposed, but a deliberate act of discrimination aimed at Millis and undertaken for the purpose of intimidating those employees who would retain their union membership. To make certain of this, the

slip was not merely given Millis but read aloud by the superintendent in the presence of the union committee assembled for the occasion. While the respondent, when met by the committee's challenge of the dismissal, agreed to reinstate Millis, it did not long adhere to this resolve. After permitting Millis a day's work, it reverted to its original purpose and again discharged him.

We find that the respondent discharged Earl Millis on August 1, 1935, because of his union affiliation and activities. Since his discharge, Millis has worked at various jobs but has not secured employment which was or is regular and substantially equivalent to the position he held with the respondent on July 26 before his first dismissal. At the hearing he requested reinstatement with the respondent. Millis' earnings with the respondent for the 52-week period ending July 31, 1935, were \$859.08.

Leo Nash and *Perl Jones* were discharged by the respondent on August 6, 1935, 5 days after Millis' employment terminated. Both men were old employees, having worked as die-cast operators in the foundry department for 10 years. Jones held the "very best job in the plant." Each joined the Union at the July 19 meeting and, as above mentioned, together with Schumaker, comprised the union shop committee.

Nash was a nephew of the foreman, Bex. After Nash became a member of the Union, Bex continuously urged him to resign and persuade the other union members to do likewise. Nash was promised that the respondent would take care of him. On one occasion Bex said, "Leo, you have a lot of expenses, and are married, and need the work bad . . . - If you want anything you go to Mr. Knapp and I will see that you get anything that you want, but I want you to give that card up and get out of there." Nash refused, saying that he would not sell out. On the morning of the discharge Bex said to Nash that he, Bex, would not "have anybody working for me that belongs to the Union." Later in the day Bex engaged both Schumaker and Nash in a conversation about the Union and asked Nash to "come up on a box outside the shop and call the whole thing off, calling upon the members to give [the respondent] their cards and resign from the Iron Molders." Nash refused. At the close of the work-day, Bex told Nash that he was all "caught up" with his work, that he should return Friday for his pay. August 6 was a Tuesday. Bex at the same time cautioned Nash that if he did not quit the Union, the respondent had a list of 30 men with whom to replace Nash and "all the rest of them." At the hearing, Bex, called by the respondent, denied generally having said "anything of that sort to him [Nash] at any time" "with reference to being in the union," or that he had said anything about giving Nash financial aid. We have indicated heretofore that Bex is not a reliable witness. His

simple denials in response to two questions, one of ambiguous statement, are entitled to no greater weight here.

Jones also was spoken to by Bex several times on the day of the discharge. Bex asked him whether he was still a member of the Union, and told him that he "better get out of it, that he was going to break it up." Jones replied that he proposed remaining a member. Thereafter, Bex had a conversation with Schumaker and Nash, at the conclusion of which he came over to Jones and discharged him.

The respondent contends that it did not discharge these members of the union shop committee but merely laid them off because of a decrease in plant operations. Evidence was introduced by it showing that in July, August, and September, 1935 it laid off employees for such reason. However, that certain men were laid off because of decreased production does not establish that Nash and Jones were laid off for similar cause. Both men were older and competent workers, and while it does not appear what seniority rules, if any, prevailed at the plant, there is no proof that they were logical persons for laying off. The conversations between Bex and the two men permit of no other conclusion than that Nash and Jones were discharged because of their membership and prominence in the Union. In carrying out its purpose to destroy the Union the respondent, through Bex, determined to rid itself of the union shop committee. When persuasion, threat, and attempted bribery failed, it resorted to discharging the men.

We find that the respondent discharged Leo Nash and Perl Jones because of their union membership and activities. Following their discharge both men succeeded in securing on October 2, 1935, other employment which was regular and substantially equivalent to their former positions with the respondent. They stated at the hearing that they do not wish to be reinstated to their former positions. During the 52-week period preceding July 31, 1935, Nash received as wages from the respondent \$1,144.55, and Jones, \$1,255.61.

Clifford Nellis was employed as an alloy maker in the foundry department for about 8 years. He joined the Union on July 19 and took an active part in its affairs. On August 8, 1935, about an hour before work ended, Goodfellow, the subforeman, approached Nellis and asked if Nellis had his union card. Nellis inquired whether Goodfellow wanted it. Goodfellow replied in the negative, saying that he just thought he would find out. About a half hour later Goodfellow returned and told Nellis that Knapp had said that he, Goodfellow, "had better lay you off until the thing clears up." Nellis understood this to mean "until they got the Union and labor trouble cleared up."

The respondent does not deny these conversations. It contends, however, that it did not discharge Nellis but merely laid him off

because of the decrease in production mentioned above. We are not satisfied that such decrease was the cause of Nellis' discharge. What we have heretofore said in connection with the contention similarly advanced by the respondent in regard to Nash and Jones is applicable here and requires no restatement. The record shows that the respondent at the time of Nellis' discharge in no wise had retreated from its hostility toward the Union. On August 8, Bex refused to arrange a conference between himself and the union representatives to discuss union matters, and Knapp told them that he was too busy to do so. Nellis' discharge, as Goodfellow's statements disclose, was anti-union in character intended as an indication to the Union that its members might not expect employment so long as the Union continued.

We find that the respondent discharged Clifford Nellis on August 8, 1935, because of his union affiliation. On October 1, 1935, Nellis secured employment which was regular and substantially equivalent to his former position with the respondent. He does not wish reinstatement. During the 52-week period ending July 31, 1935, he earned \$963.56.

Thomas Ganley and *Francis Deery* were discharged, and 15 other employees in the foundry department were discharged or laid off on August 14, 1935. On the morning of the discharge and lay-off all employees of the department were told by the doorman as they came to work that those whose time tickets were not in the rack were "not wanted." The tickets of Ganley, Deery, and the 15 mentioned employees were not in the rack. All of the men were union members. As they assembled in a group Bex came to them and told them that there was no work for them that morning and they would have to go home, that if any work became available he would send for them.

Though it always had been the practice at the plant in connection with lay-offs for Bex to communicate with the men when production rose and recall them to work, Bex never thereafter communicated with either Ganley or Deery about reemployment. Ganley had worked as a die-cast operator at the plant for 14 years, Deery as an operator's puller for 8 years. Both men were active in union affairs. Ganley had joined the Union in the early part of August, Deery on July 19.

The record shows that 2 days before the mass discharge or lay-off, the Union held a meeting after work at the union meeting hall. As the meeting was about to commence, Skelton, a supervisor, cruised past the hall several times in an automobile, observing the persons entering. Deery, who happened to be standing outside, observed Skelton and waved to him. Skelton watched Deery enter. Later

Jones, Deery, and another union member were gathered outside the hall. At that time Bex drove by in his automobile. The third union member adverted to this, which prompted Deery to remark, "They [referring to Skelton and Bex] must be spying or playing tag with each other."

The respondent urges that it laid off all of the above 17 employees in consequence of the above-mentioned drop in production. In support of this contention, and of similar argument heretofore set forth, it introduced testimony to the effect that during July, August, and September, when the lay-offs induced by the decreased production occurred, some 50 or 75 employees who were not union members were among those laid off. The record is not clear as to whether these non-union employees all worked in the same department where the 17 and other union members worked, or comprised workers in other departments as well. Nor is it apparent that the 50 to 75 did not include employees who not only were laid off but were not returned to work during the 3-month period. If it be considered that the non-union employees worked in the foundry department and remained out of work during the summer of 1935, the respondent's proof still is uncertain, for its claim of 50 to 75 such employees is obviously greatly exaggerated. It was shown that the maximum number of workers employed in the foundry department in July and August was 95, and that September had less man-hours of work than either of the prior 2 months. The record also shows that from August 27 to October 1, 1935, 45 of the union employees in the foundry department went on strike, principally as a result of the respondent's unfair labor practices. If the figure 50 to 75 be accurate, the respondent would have laid off more workers than were in fact available for laying off.

Nowhere in the record does it appear that any non-union employees were laid off at the time the 17 union employees were discharged or laid off en masse. Moreover, their discharge or lay-off occurred within 2 days after the foreman of the foundry department and another supervisor each drove by the meeting hall, as heretofore stated, observing those who attended. We are convinced that the services of all 17 were terminated because of their union affiliation. Whether they were discharged or laid off is immaterial. In either case they were the objects of discrimination. In the instance of Ganley and Deery, who never were communicated with by the respondent in regard to returning to work, we feel that they were discharged. The selection of 17 employees for discharge or lay-off, all of whom were union members, following upon Bex's and Skelton's spying on the meeting hall, was not mere chance. Nor have we any

doubt that Bex and Skelton did drive by to spy on the Union and note who attended.⁹

We find that the respondent discharged Thomas Ganley and Francis Deery on August 14, 1935, because of their union membership and activities. Ganley secured other employment in March 1936, which was regular and substantially equivalent to his former position with the respondent. He does not wish to be reinstated. In the 52-week period preceding July 31, 1935, he received as wages from the respondent \$866.94. On October 3, 1935, Deery went to the respondent to ask for a recommendation for other employment. At that time he was offered reinstatement, which he refused. This occurred before the charges were filed and complaint issued. He now seeks reemployment. During the 52-week period preceding July 31, 1935, he earned \$731.37.

Merwin Wilbur and *Harry Wilbur* allegedly were laid off on August 15, 1935. Both had been old employees in the foundry department. The evidence of their having been discriminated against, however, is inconclusive. Merwin Wilbur was not active in the Union; Harry Wilbur first joined it on the day after the asserted lay-off. It may be that they were among those who were laid off because of decreased production. In any event the evidence is insufficient to support the allegations of the complaint in respect to them. We will dismiss the complaint in so far as it alleges that the respondent discriminated against Merwin and Harry Wilbur.

We find that the respondent, in discharging Earl Millis, Leo Nash, Perl Jones, Clifford Nellis, Thomas Ganley, and Francis Deery, because of their union membership and activities, has discriminated in regard to the tenure of employment of said persons, and each of them, thereby discouraging membership in the Union; that in and by said discharges the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

⁹The Board has had occasion to observe similar acts of supervisory officials in driving by union meeting places in automobiles, and to point out the intimidatory character of this form of overt espionage *Matter of Williams Manufacturing Company, Portsmouth, Ohio* and *United Shoe Workers of America, Portsmouth, Ohio*, 6 N. L. R. B. 135; *Matter of C. A. Lund Company* and *Novelty Workers Union, Local 1866 (A. F. of L.) successor, etc.*, 6 N. L. R. B. 423. See also *Matter of Millfay Manufacturing Company, Inc.* and *American Federation of Hosiery Workers, Branch 40*, 2 N. L. R. B. 919.

THE REMEDY

As we have found that the respondent discriminated in regard to the tenure of employment of Earl Millis, Leo Nash, Perl Jones, Clifford Nellis, Thomas Ganley, and Francis Deery, and thereby interfered with the right of its employees to self-organization, we will order the respondent to cease and desist from such unfair labor practices.

Moreover, we will order the respondent to take certain affirmative action which we deem necessary to effectuate the policies of the Act. We will direct it to offer Millis full and complete reinstatement to the position which he formerly occupied with the respondent on and before July 26, 1935, when the respondent first discriminated against him, and to make him whole for any loss of pay he may have sustained, by reason of the discrimination, from the date of his discharge on August 1, 1935, until he is offered reinstatement, less his net earnings¹⁰ during that period. 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. With respect to Nash, Jones, Nellis, and Ganley, we will not order that they be offered reinstatement inasmuch as they disclaimed any wish to be reinstated and have obtained regular and substantially equivalent employment elsewhere. However, we will direct that each be made whole for any loss of pay suffered by virtue of his discriminatory discharge, from the date of his respective discharge until he secured such other employment, less his net earnings during that period. In computing such net earnings of each of said four employees, however, no deduction from his earnings shall be made on account of expenses incurred by him by way of transportation or otherwise in connection with his obtaining regular and substantially equivalent employment elsewhere. As the respondent on October 3, 1935, offered to reinstate Deery and he refused to accept such offer, we do not feel that under the circumstances here involved it will effectuate the policies of the Act to require the respondent again to offer him reinstatement, even though Deery now wishes reinstatement. We will, however, order the respondent to make him whole for any loss of pay suffered from the date his employment was discriminatorily terminated to October 3, 1935, the date on which the respondent offered to reinstate him, less his net earnings during that period.

¹⁰ 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

While, as above indicated, there was a strike at the plant from August 27 until October 1, 1935, the record shows that the foundry department was not shut down during this period but remained in operation. Accordingly, we will not exclude this period from the time for which back pay will be awarded. In computing such back pay, if any, of each of said persons, his respective earnings with the respondent during the 52-week period preceding July 31, 1935, as heretofore set forth, shall be used as the measure.

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

CONCLUSIONS OF LAW

1. International Molders Union of North America, Local 80, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. The respondent, by discriminating in regard to the tenure of employment of Earl Millis, Leo Nash, Perl Jones, Clifford Nellis, Thomas Ganley, and Francis Deery, and thereby discouraging membership in the Union, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

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 discriminated in regard to the hire or tenure of employment or any term or condition of employment, of Merwin Wilbur and Harry Wilbur, or of either of them, within the meaning of Section 8 (3) of the Act.

ORDER

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

1. Cease and desist from:

"(a) In any manner discouraging membership in International Molders Union of North America, Local 80, or any other labor organization of its employees, by discharging or refusing to reinstate, or by laying off any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment;

(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, and to engage in concerted activities for their 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 Earl Millis immediate and full reinstatement to the position which he formerly occupied at the Fayetteville plant on and before July 26, 1935, or to a position substantially equivalent to such position, without prejudice to his seniority and other rights and privileges; and make whole said Millis for any loss of pay he may have suffered by reason of his discharge by payment to him of a sum of money equal to that which he normally would have earned as wages during the period from August 1, 1935, to the date of such offer of reinstatement, less his net earnings during such period;

(b) Make whole Leo Nash, Perl Jones, Clifford Nellis, Thomas Ganley, and Francis Deery for any loss of pay suffered by reason of their discharges, by payment to each of them as follows: pay to Leo Nash a sum of money equal to that which he normally would have earned as wages during the period from August 6 to October 2, 1935, less his net earnings during such period; to Perl Jones a sum of money equal to that which he normally would have earned as wages from August 6 to October 2, 1935, less his net earnings during such period; to Clifford Nellis a sum of money equal to that which he normally would have earned as wages from August 8 to October 1, 1935, less his net earnings during such period; to Thomas Ganley a sum of money equal to that which he normally would have earned as wages from August 14, 1935, to March 1, 1936, less his net earnings during such period; and to Francis Deery a sum of money equal to that which he normally would have earned as wages from August 14 to October 3, 1935, less his net earnings during such period;

(c) Post immediately notices to its employees in conspicuous places throughout its plant at Fayetteville, New York, and maintain such notices for a period of at least thirty (30) consecutive days from the date of posting, stating that the respondent will cease and desist as set forth in 1 (a) and (b);

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

And it is further ordered that the complaint, in so far as it alleges that the respondent has discriminated in regard to the hire and tenure of employment of Merwin Wilbur and Harry Wilbur, be, and it hereby is, dismissed.