

In the Matter of COLUMBIAN ENAMELING & STAMPING COMPANY and
ENAMELING & STAMPING MILL EMPLOYEES UNION, No. 19694

Case No. C-14.—Decided February 14, 1936

Stamping and Enameling Industry—Interference, Restraint or Coercion: circularizing employees on subjects of bargaining between employer and union representatives; soliciting individual strikers to cease striking—*Strike—Marital Law—Employee Status:* during strike—*Representatives:* proof of choice: membership in union—*Unit Appropriate for Collective Bargaining:* production employees—*Collective Bargaining:* employer's duty as affected by strike; refusal to meet representatives; refusal to recognize representatives—*Reinstatement Ordered, Strikers:* discrimination in reinstatement; displacement of employees hired during strike.

Mr. Melvin C. Smith for the Board.

Mr. Otto A. Jaburek, of Chicago, Ill., and *Mr. Josiah T. Walker*, *Mr. Louis R. Hilleary*, and *Mr. Wilson N. Cox*, of Terre Haute, Ind., for respondent.

Mr. Maurice J. Nicoson, for the Union.

Mr. Louis L. Jaffe, of counsel to the Board.

DECISION

STATEMENT OF CASE

On October 31, 1935, Enameling & Stamping Mill Employees Union No. 19694, hereinafter referred to as the union, filed with the Regional Director for the Eleventh Region a charge that the Columbian Enameling & Stamping Company had engaged in and was engaging in unfair labor practices forbidden by the National Labor Relations Act. On November 21, 1935 the Board issued a complaint against the Columbian Enameling & Stamping Company, hereinafter referred to as the respondent, said complaint being signed by the Regional Director for the Eleventh Region and alleging that the respondent had committed unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1) and (5) and Section 2, subdivisions (6) and (7) of the National Labor Relations Act. In respect to the unfair labor practices the complainant alleged in substance:

1. All the departments at the Terre Haute Plant of the respondent with the exception of the office and clerical departments consti-

tute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of said Act.

2. On or before March 22, 1935, and at all times thereafter mentioned herein, a majority of the employees in said unit had designated the union as their representative for the purposes of collective bargaining with the respondent, such designation having been made by becoming members of the union and appointing a committee of union members to bargain with the respondent. At all times since March 22, 1935, said union has been the representative for collective bargaining of a majority of the employees in said unit and has by virtue of Section 9 (a) of said Act, been the exclusive representative of all employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

3. On July 22, September 20, and October 11, 1935, while the respondent was engaged at the Terre Haute Plant as described above, the union requested the respondent, through its officers, agents and employees to bargain collectively in respect to rates of pay, wages, hours of employment, and other conditions of employment, with the union as the representative of the employees who are members of the union and as the exclusive representative of all the employees in said unit. On said dates and at all times thereafter the respondent did refuse and has refused to bargain collectively with the union as the representative of the employees who are members of the union or as the exclusive representative of all the employees in said unit, in that it refused to meet, for the purpose of collective bargaining or any other purpose, with the committee of the union designated by the union to engage in collective bargaining.

4. On or about March 22, 1935, the union duly voted to call a strike of the employees in the Terre Haute Plant of the respondent and since that date and at all times thereafter mentioned herein the employees who are members of the union and other employees have been on strike. The union has not since March 22, 1935, or at any time thereafter, voted to cease such strike or to return to employment at the Terre Haute Plant. On many occasions since July 5, 1935, the respondent through its officers and agents has solicited individual employees who are members of the union to return to employment, has threatened such employees with permanent discharge if they did not so return to employment immediately, and has informed such employees that there would never henceforth be a union at the Terre Haute Plant and has attempted to induce and has induced many of such employees to return to employment at the Terre Haute Plant, while at the same time refusing to bargain collectively with the union as set forth hereinabove.

The complaint and accompanying Notice of Hearing were served on the respondent in accordance with National Labor Relations Board Rules and Regulations—Series 1, Article V.

On December 2, 1935, the respondent filed an answer alleging in substance as follows:

1. That the National Labor Relations Act violates the Fifth Amendment to the Constitution of the United States and is accordingly unconstitutional.

2. That the respondent is not engaged in interstate commerce and that its operations do not constitute a continuous flow of trade or commerce and, as applied to it, the National Labor Relations Act is unconstitutional and void.

3. That the allegations do not constitute charges of unfair labor practices.

4. That in July and August of 1935, the respondent afforded all striking employees an opportunity to return to its employment without discrimination and a large number did so return.

5. That the respondent on July 14, 1934, entered into a contract with the union, one of the provisions of which was for arbitration of disputes and disagreements; that at various times the union made demands contrary to the provisions of the agreement; that such a demand was the demand for a closed shop; that according to the aforesaid agreement, the union demanded arbitration of these disputes though they did not in fact or law arise thereunder; that the union spread misinformation as to respondent's position in respect to arbitration and to the effect that respondent was violating the agreement; that the union instituted a strike against the respondent because it would not accede to the closed shop; that the union engaged in acts of violence against respondent's property; that on July 19, 1935 respondent began preparations for re-opening its plant and that the union thereupon interfered with employees engaged in so re-opening the plant; that sometime after July 23, 1935 the respondent filled all available positions in its plant; that thereupon the strike against respondent ceased to exist.

6. That the aforesaid strike was an unlawful strike for an unlawful purpose and in violation of the aforesaid agreement; that those employees who joined in said strike ceased to be employees of respondent; that none of those who reentered respondent's employment have made any request upon respondent that it bargain collectively.

7. That those persons who sought on September 20, 1935 and October 11, 1935 to bargain collectively as employees with respondent were not employees of respondent and sought to end a controversy which had ceased to exist.

Commencing on December 9, 1935 a hearing was held at Terre Haute, Indiana, by Daniel M. Lyons sitting as Trial Examiner, and testimony was taken. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded to both parties. The respondent moved to dismiss the complaint on the ground that the Act is unconstitutional in that "it is violative of the Commerce Clause of the Constitution; second, that it is violative of the Fifth Amendment to the Constitution; and thirdly, that it failed to state a cause of action." The motion was denied by the Trial Examiner and an exception was thereupon taken. The motion was renewed at the conclusion of the hearing and again denied. Objection was taken to the introduction into evidence of the union's charge and overruled.

On December 16, 1935 the Board, acting pursuant to Section 35, Article II of said Rules and Regulations—Series 1, directed that the proceeding be transferred to and continued before it.

FINDINGS OF FACT

Upon the record in the case, the stenographic transcript of the hearing, and all the evidence including oral testimony, documents and other evidence offered and received at the hearing, the following findings of fact are made.

I. COLUMBIAN ENAMELING AND STAMPING CO.

The Columbian Enameling and Stamping Company is an Indiana Corporation engaged in the manufacture and sale of metal utensils coated with enamel, zinc, tin or other substances for kitchen, hospital, and laboratory use. It manufactures also wall tile and roof shingles, both enamelware products.

The respondent manufactures its products at its plant in Terre Haute, Indiana. It is one of 19 active competitors in the industry. It employs on the average 600 persons. During the period in question there were approximately 600 employees; excluding foremen and clerical workers, a few more than 500. Between the dates of January 1, 1935, and December 9, 1935 the respondent shipped 4,549,695 pounds of its product to 47 states, the District of Columbia and Canada, 85% of its product being shipped outside of Indiana. The plant was closed down from March 23, to July 23, 1935, and its shipments were considerably less than in the prior years, 1933 and 1934. Thus in 1933 it shipped out 302 carloads of its product, in 1934, 385, and the first 11 months of 1935 only 215.

Exclusive of the coal used in the manufacture of its product, and cartons used in shipping the product, a majority of its raw materials are shipped from points outside of Indiana, in all from 20

states; including these a majority of the inbound shipments are transported from Indiana. Some of the materials originate in Greenland and China. The principal materials are sheet steel which serves as the body of the utensil, and chemicals, sand, and clay from which the enamel coating is prepared. Between the dates of January 1, 1935 and December 9, 1935 it shipped into its plant 22,713,000 pounds of various materials. During the years 1933 and 1934 inbound materials averaged 500 carloads; in the first 11 months of 1935 there were approximately 286 carloads.

In its shipping operations the respondent uses the services of three interstate railroads and eight interstate truckers. It has sales offices in New York, New York; Chicago, Illinois and Los Angeles, California. It advertises in national trade journals. It has registered with the United States Patent Office a number of trade marks for use in interstate commerce.

The operations of the respondent constitute a continuous flow of trade traffic, and commerce among the several states.

II. RELATIONS BETWEEN THE UNION AND THE RESPONDENT

1. *The agreement of June 14, 1934*

Federal Labor Union No. 19694, was formed on June 14, 1934 for the purpose of creating an agency for collective bargaining between the respondent and its employees, and is a labor organization affiliated with the American Federation of Labor. Membership was limited to the production workers in the plant, that is: all employees exclusive of clerical and supervisory workers. In September 1934 some 450 of the 500 odd production workers were union members; in March 1935 membership reached 485.

On July 5, 1934 the union presented an agreement to the respondent. The respondent refused to sign the agreement. The union voted to strike. The union asked the Indianapolis Regional Labor Board, then functioning under the National Industrial Recovery Act, to intervene. Upon the request of the Regional Labor Board, representatives of the union and of the respondent met together with Dr. Beckner, Chairman of the Regional Board. The union's proposed agreement was discussed point by point. Upon the basis of the discussion Dr. Beckner forthwith drafted an agreement which on the same day was signed on behalf of the union, the respondent, and the Regional Board. On the following Monday, (July 16, 1934) the employees did not present themselves for work. The next day plant operation was resumed. The agreement provided for seniority, rest periods, "spreading the work", hearing upon dismissal by a committee of employees and management, a minimum of 2 hours pay for any employee required to report for duty, an eight hour day when pos-

sible, and a grievance committee. It provided also that "in any case in which a satisfactory settlement of a dispute arising under this contract cannot be reached", such dispute shall be referred to a committee of arbitration "to be composed of 2 management and 2 union representatives, and a fifth person to be selected by these four". The contract was to run for one year. There was a provision that either party desiring to terminate or modify the agreement shall give 30 days' notice in advance of termination.

2. The check-off issue

Acting under its Constitution the union appointed a Scale Committee to deal with the management. On August 8, 1934 the Scale Committee requested the respondent to institute the check-off system on behalf of the union, i. e., the respondent to deduct union dues from the pay of members and remit to the union. On August 30, 1935 Mr. Grabbe, General Manager of the respondent, informed the Committee that a statute of Indiana (2, Burns Indiana Statutes, 1933, Sections 40-201, 202, 203 and 204) prohibited the assignment of wages beyond thirty days, and that to institute the check-off consistently with this statute, each employee member would have to sign a pay deduction form every fifteen days. Mr. Grabbe further informed the Committee that the union would have to pay the administrative expenses involved. At a meeting on September 5, 1934, the Scale Committee expressed itself as willing to pay these expenses, but wanted only a single authorization by each employee to cover the period of the Indianapolis agreement. On September 18, 1935 Mr. Grabbe told Mr. Cox, a member of the Committee, that the respondent could not accede to this request. On October 4, 1935 the respondent sent a circular to all of its employees stating that the check-off system as requested by the Scale Committee was illegal and that the company would not knowingly violate a statute. At a meeting in the middle of October, the Committee pointed out that for ten years the company had been checking off premiums for insurance policies without any pay deduction authorizations.

3. The closed shop issue

On October 1, 1934 the union informed the respondent by letter that all members of the union should be in good financial standing "under penalty of disassociation". On October 4, 1934 the respondent replied by letter asking whether the union intended by its letter of October 1, 1934 to terminate the Indianapolis agreement and whether it meant to say that its members would refuse to work with members who were delinquent in their dues. On October

22, 1934 the union informed the respondent by letter that its letter of October 1, 1934 meant that a delinquent member would lose his "association" rights. On October 23, 1934 the union requested that the agreement be modified (in what respect was not stated), the letter to serve as 30 day notice of modification pursuant to the Indianapolis agreement. On October 30, 1934 the respondent replied by letter that it would meet the association on November 23, 1934 to discuss the modification. The meeting was postponed to November 26, 1934 at the request of T. N. Taylor, president of the State Federation of Labor, and an organizer for the American Federation of Labor. On that date Mr. Taylor and the Scale Committee, on behalf of the union, met with the respondent's officers. Mr. Taylor stated that the union "would like to have" a closed shop. Mr. Grabbe replied that the respondent could not grant a closed shop; that the closed shop was contrary to the principles under which the company had operated since 1871. Mr. Taylor indicated that the respondent might "forget the matter".

On January 4, 1935 the Scale Committee presented a number of demands, among them a demand that the company agree to lay off any member of the union who becomes suspended. On January 21, 1935, by a circular letter to all of its employees, the respondent replied that it would not agree to the aforementioned demand; that suspension is a matter of union business and is not company business; that the union had previously asked for a closed shop and the company had denied it as contrary to the principle of equal opportunity. On February 5, 1935 the union, by letter to the respondent, asked that the proposals of January 4, 1935 be taken to arbitration pursuant to the Indianapolis agreement.

4. *Other issues*

At a number of meetings between the respondent and the Scale Committee, the issues of wage increases on one hand, and unrest and waste allegedly caused by union activity on the other, came up, sometimes separately, sometimes as connected subjects. At the meeting of November 26, 1934 Mr. Taylor asked for a 20% increase. Mr. Grabbe replied that the competitive situation made it impossible, and he testified that he took occasion to "complain bitterly" that the unrest caused in the factory had increased spoilage; due to this cause, he said, it was \$1,500 over normal in July, 1934 and \$5,000 over normal by October, 1934. He attributed the unrest to intimidation, coercion and solicitation for dues. In previous meetings he had admonished the union against activity in the plant during working hours. In its proposals of January 4, 1935, already mentioned, the union pledged its aid in the promotion of effi-

ciency and demanded that if at the end of ninety days the present unrest had been eliminated and the production loss had been reduced to a normal minimum, the minimum wage rate for females would be forty cents, for males, forty-five cents, which would apparently have meant a raise. In its circular reply to the proposals of January 4th the respondent replied that the competitive situation made an increase impossible. This, too, was one of the proposals upon which the union asked for arbitration by its letter of February 5th.

At meetings on February 7, 1935 and March 5, 1935 the Committee claimed that certain employees were entitled to two hours pay on a day when they had been called to work but not employed, because the power plant had broken down. At both meetings officers of the respondent, in reply, referred to the negotiations in connection with the Indianapolis agreement at which the clause providing for pay during a wait caused by breakdown had been eliminated from the agreement.¹

5. *The sending of circulars to all employees*

Beginning on October 4, 1934 the respondent sent occasional circular letters to all its employees discussing union proposals. To justify this unusual procedure Mr. Grabbe, testifying at the hearing, stated that many employees had told him that they could get no information from the Scale Committee as to what was going on and asked that they be sent letters or that bulletins be posted. In this circular it was said in substance:

“A feeling of unrest is not conducive to good work. To those of you who are not quite sure in your minds regarding the company’s attitude on matters recently discussed in the factory, I have the following to say, namely: that the company was impartial as between employees belonging and those not belonging to an organization and that the check-off as proposed by the union was illegal.”

At the meeting of January 4, 1935, at which the proposals of that date were presented, Mr. Grabbe criticized the Committee for not keeping the membership fully informed.

¹ Though it is unnecessary for us to decide this question, as such, it should be pointed out that the provision eliminated set no limit on hours of pay in case of breakdown

This clause was as follows: “No piece workers shall be penalized while waiting for material, break-down of machinery or any other condition not controlled by the employee”.

The clause adopted provides that any employee required to report shall receive a minimum of 2 hours’ pay. There is a real question whether this is not applicable regardless of the cause of failure of work. This was not one of the questions on which, specifically at least, arbitration was requested

On January 21, 1935 the respondent sent out the circular letter already referred to in which it answered point by point the union's proposals of January 4, 1935. This circular stated that each employee was being given a copy so that he might be informed of the union's request and of the reply made to the Scale Committee. It does not appear, however, that any reply was made to the Scale Committee as such. At the meeting of February 7, 1935 the respondent did discuss the proposals, apparently for the purpose of showing that they were not disputes arising under the agreement and so not arbitrable. The question arose in this form because, as set forth above, in a letter sent on February 5, 1935 to the respondent, the union had demanded arbitration of its proposals of January 4, 1935. On February 8, 1935 the respondent sent a letter to the union and a circular letter to all its employees stating that the proposals of January 4 dealt with matters not covered by the Indianapolis agreement, were not disputes under it, and were not arbitrable under it. The circular letter concluded:

"Our Corporation lawyers advise us that the Scale Committee is acting against the contract when they request that the proposal be submitted to arbitration—under the contract their proposal cannot be taken to arbitration."

On February 9, 1935 the union addressed the respondent by letter as follows:

"It was moved unanimously . . . that the company deal directly with the scale committee . . . in matters concerning said union and not individually through the mail. As the union has a personnel of 476 we know exactly what is taking place. We do not want the information given to foremen and non-members. This is only to comply with Section 7 A (Collective bargaining) of the National Recovery Act . . . ;

"If this action is taken again this body will consider such action as discrimination and deal with it as such regardless."

On February 19, 1935 the respondent replied by letter to the union and a circular letter to its employees. The respondent stated that misunderstanding often causes "deserving, efficient and loyal employees of a company to lose their jobs through agitation and strikes which they do not instigate" and which arise from individual misinformation; that all employees were entitled to be advised on developments of labor policy in the plant; that, in the words of the President of the United States, employees were to be free from coercion "from any source" and this meant free from agitators who tried to coerce unorganized workers to join some particular organization; that the Scale Committee "during the past

few months seems to have made up its mind that it wants to manage not only the company, but all the employees working for it;" that all the disturbance boils down to the basic issue of more pay but that competitive conditions made that impossible.

At a meeting between the Scale Committee and the respondent on March 5, 1935 the Committee protested against the use of circulars. After discussion Mr. Grabbe, for the respondent, agreed to read to the Committee any circulars to be sent and allow the Committee to state objections and make changes accordingly where possible. The Committee felt that in one of the circulars the words "scale committee" had been used with slurring intention. The respondent agreed to post a letter correcting this impression; this was done.

III. THE STRIKE AND THE ATTEMPT TO SETTLE IT

1. *The strike*

On March 11, 1935 the Scale Committee and Mr. Taylor met with the respondent. Mr. Taylor wished to discuss the proposals of January 4, 1935, some of which have already been considered above. These proposals and the answers given by the respondent, under the signature of Werner Grabbe, General Manager, in its circular letter of January 21, 1935 were in substance as follows: Proposal 1. The union agrees to cooperate with the company in mutual aid for efficiency. Answer: "We, who are the employees of the company", are obligated to work for the company with each other. None of us is required to join any organization. Proposal 2. The foreman is to report anyone lax in his duty to the Committee which will investigate and assist in correcting the condition. Answer: Cannot agree; company must have full control in this matter. Proposal 3. Company shall post a notice that the union represents a majority and is the bargaining committee for all employees of the plant. Answer: Cannot agree; any group of employees free to discuss problems with the management. Proposal 4. Employees shall correct certain bad work but with specified exceptions. Answer: This represents the present practice. Proposal 5. Committees shall not discuss grievances during working hours unless called on by foreman. Answer: This represents the present practice. Proposal 6. Committee agrees to cooperate with company in enforcing all shop rules agreed to by both. Answer: Making and enforcing of company rules is management's responsibility. Proposal 7. The company agrees to lay off any member of the union who becomes suspended. Answer: Cannot agree. Proposal 8. If at end of 90 days, present unrest has been eliminated and production loss reduced to normal minimum, company agrees to certain minimum wages. Answer: Cannot agree.

As noted above, the union, after the respondent's answer to these proposals, had asked for arbitration of them under the Indianapolis agreement and the respondent had replied that they were not arbitrable thereunder. Once before in November, 1934 the respondent had taken the same position with respect to the arbitration of a proposed wage increase. At the meeting of March 11th the respondent announced that it had given its final answer to the January 4th proposals, and again explained its reasons.

On March 17, 1935 the union sent the respondent a copy of resolutions adopted by it. The resolutions recited breaches of the Indianapolis agreement by the respondent in that (a) it had failed to live up to the provision for two hours' minimum pay² and (b) it had failed to arbitrate in accordance therewith. They accused the respondent of "violating every principle of collective bargaining"; of seeking to damage the union by questioning the loyalty, honesty and intelligence of the Committee and insinuating that its organizer was an agitator (referring to the circular of February 19, 1935). (See *supra* heading: *Circulars*, etc.) The resolutions conclude that in the interests of peace and harmony, the members will not continue to work with anyone eligible for union membership who does not become a member on or before March 23, 1935.

On March 23, 1935 the strike was called. Of the union members, approximately 450 walked out on this day; the union permitted 35 men in the power house to remain at work. On March 30, 1935 the respondent announced that the factory was closed indefinitely.

2. Attempts to settle strike

On March 23, 1935 a conciliator from the Department of Labor, one Mythen, undertook to settle the strike. According to the testimony of Mr. Grabbe, for the respondent, Mythen stated that all that the union wanted was a closed shop, and that that was not an unreasonable demand. The respondent rejected the proposal and Mythen gave up his attempt.

On or before May 10, 1935 the Mayor of Terre Haute requested the respondent to meet with him and union representatives. The respondent declined. In its letter to the Mayor it pointed out that the union demanded a closed shop; that it could not accede and a meeting would be useless. It concluded: "If the union calls off the strike, the factory will be reopened promptly without discrimination or reduction in wages, but only as an open shop *without union recognition or agreement*". (Italics added.)

On June 7, 1935 the respondent placed in three Terre Haute newspapers an advertisement, reciting that the strike had been called

² See footnote No 1, *supra*

to force the company to discharge nonunion employees. The advertisement then stated: "The company is willing to operate its plant, using former employees, without discrimination against union members and without change in wages, but only as an open shop *without union recognition or agreement*. The above are the conditions under which the company has operated for 33 years to the general satisfaction of the employees. If the plant cannot be operated under these conditions, it will be closed indefinitely." (Italics added.)

On the same day (June 7, 1935) three members of the Scale Committee requested by letter a meeting with the respondent. It stated that, "Our membership is convinced that no controversy is so great that cannot be settled across the conference table".

On June 11, 1935 three members of the Scale Committee met Mr. Gorby, Mr. Gorby, Junior, and Mr. Grabbe, officers of the respondent, at a Terre Haute hotel. Grabbe reiterated the stand taken in the company's advertisement of June 7th. The men could come back but without recognition of the union and without any agreement and that if they didn't want their jobs back, he would get somebody else. There was no expressed difference of opinion as to wages and working conditions. The issue of closed shop was discussed, though Mr. Gorby, the president of the respondent, could not remember who brought it up. According to the testimony of Grabbe, the Committee stated at the conclusion, "that they would come back to work but only under their own conditions . . . and that they would report the conversation to the body and report back to us the action of the body".

From the beginning of the strike the union had picketed the plant. On July 19, 1935 forty company men were escorted into the plant by four police cars. The police pointed guns at the pickets while the trucks bearing the men went into the grounds. Thereupon enormous crowds gathered outside of the plant. On July 22, 1935 the Central Labor Union called a general strike of all labor in the city of Terre Haute. It appears from a statement terminating the general strike inserted on July 23, 1935 in the Terre Haute Star (introduced by the respondent) that the strike was called in protest against the use of city police and the militia. During the evening of July 22 there was a crowd outside the plant estimated at 15,000 persons, among them some 200 to 300 strikers. "Missiles" were thrown at the plant. At 11:15 P. M., 750 militia were marched into the plant and martial law was proclaimed. Picketing was forbidden and not resumed until August 4, 1935.

On July 23, 1935 two labor conciliators from the Department of Labor, Richardson and Scheck, appeared in Terre Haute. The union requested them "to try and open up negotiations with the

respondent".³ On the same or the next day these two men met with Mr. Gorby, president of the respondent. They conferred for three hours. Mr. Gorby was requested to meet the Scale Committee, and agreed. The conciliators reported this to the union. Several days later Mr. Gorby told the conciliators he would not have a meeting with them or the Scale Committee.

On July 23, 1935 the respondent resumed operations at its plant. Between that date and August 19, 1934 it had received 3,000 applications for employment. Mr. Grabbe, general manager of the respondent, estimated that on or about August 19, 1934, 190 of the production employees of March 23rd (the day of the strike) had returned. By the second week in September 1934 the respondent had employed a full force.

As early as May 20 company foremen approached individual workers and sought to induce them to return to the employ of the respondent. They were more active in July, both before and after the opening of the plant. One foreman solicited as many as 100 men; another saw many but did not know how many. One soliciting foreman had been reemployed in June. After July 23rd a number of those foremen were in the employ of the company. Under these circumstances, testimony of the foremen that they were not instructed by the respondent to solicit seems entitled to little or no weight. One worker was told by a foreman that there would be no union in the plant; this was not denied. Another was told substantially the same thing; this was not effectively denied.

On September 20, 1935, and again on October 11, 1935, the union wrote to the respondent asking for a meeting to settle the controversy between them, both of which the respondent received, but to neither of which it replied. In the latter part of October, 1935, the union asked Max Schaefer, vice president of the Central Labor Union of Terre Haute, to contact the respondent⁴ and on October 28, 1935 he met Mr. Gorby, represented that he had come on behalf of the union, and sought to work out an arrangement whereby the striking employees could be returned to work. He suggested that new men taken on since

³ The respondent objected to this testimony on the ground that the conversation between the union and the conciliators does not "bind" the respondent, and again on the ground that it does not appear that the conciliators told Mr. Gorby that the union had made a request for the meeting. Mr. Gorby testified that the conciliators asked him to meet with the Scale Committee and that he knew the purpose of the requested meeting. Since it appears that the conciliators were entrusted by the union with a mission, duly met with the respondent in pursuance thereof, and reported back to the union as to the result, it is a proper inference that Mr. Gorby knew of their trust. Consequently the evidence of the witnesses Cox and Heuer to which objection was taken is properly part of the record.

⁴ The respondent objected to this testimony on the ground that it does not anywhere appear that Schaefer told Gorby that he (Schaefer) had been authorized by the union to seek a meeting. Gorby admitted that Schaefer had stated that he came "on behalf of the union."

July 23rd be discharged to make place for the strikers. Mr. Gorby stated that he could not agree to that proposal, but that any strikers might sign an application for employment and would be employed when needed.

IV. THE UNFAIR LABOR PRACTICES

The complaint alleges and the answer denies that on July 22, September 30, and October 11, 1935, the respondent refused to bargain with the representatives of its employees.

It is unquestioned that on July 23, 1935, the respondent informed the labor conciliators, Scheck and Richardson, that it would meet with the Scale Committee and that a few days later the respondent advised the conciliators that it would not meet either the conciliators or the Scale Committee. It seems clear that Mr. Gorby, president of the respondent, knew that the union was seeking through the conciliators to bargain with the respondent with respect to the settlement of the strike. The union represented an overwhelming majority of the employees in March; practically all had struck and were still on strike. The respondent admits (Brief p. 9) that the membership of the union has not been reduced. On July 23rd the respondent had opened its plant but did not have its full quota of employees until nearly two months later. It would seem clear, therefore, that at this time the union represented a majority of the respondent's employees, that it sought to bargain with the respondent, that the respondent refused to so bargain, and that this constituted an unfair labor practice within the meaning of Section 8, subdivision (5) of the Act.

To this conclusion the respondent opposes two objections. *First:* The men on strike were not employees on July 23rd. *Second:* The Union was attempting to force a closed shop upon the respondent.

Section 2 (3) of the Act provides that the term "employee" shall include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

The respondent maintains that the strike was in violation of the Indianapolis agreement and so illegal; and therefore the employees lost their status as such by striking. The agreement contains no provision against a strike except when a dispute under the agreement is being arbitrated, and the respondent has at all times maintained that the dispute was not arbitrable under the agreement. Furthermore, the Union had many months before given 30 days notice of termination in accordance with the agreement.

The respondent argues that the strike was illegal also for the reason that it was for a closed shop. Under the law of Indiana,

however, it would seem that a strike for a closed shop (admitting the strike to have been such) is considered a justifiable attempt to advance the legitimate interests of the members of the Union and is legal. *Shaughnessey v. Jordan*, (1916) 184 Ind. 499, 111 N.E. 622. Furthermore the Act makes no distinction based on the issue involved in the labor dispute. An individual whose work has ceased in connection with "any" current labor dispute continues to be an employee for the purposes of the Act.

The labor dispute in question was "current" at the time when in late July the strikers sought to exercise their rights under the Act. The respondent defines "current" as "existing at the present time". It is at the time when the individual seeks to assert his rights as an employee that the dispute must be current. From March 23rd to July 23rd the strike was actively prosecuted and was effective in keeping the plant closed down. The strikers picketed the plant without interruption. The Scale Committee on a number of occasions pressed the union's claims. On July 23rd the president of the respondent met and talked with the conciliators of the Department of Labor and agreed to meet the Scale Committee. Apparently the respondent was at that time aware that a labor dispute existed. In *Dail-Overland Company v. Willys-Overland, Inc.*, 265 Fed. 171, cited by the respondent, the Court said (p. 188):

"As long as conditions are such that what is called 'settlement' might seem reasonably possible between the company and its late workmen, the latter, it seems should be considered 'employees', within the meaning of that term in the Clayton Act".

These words are strictly applicable here. The Act seeks by its remedies to promote industrial harmony. The Act recognizes that the need for these remedies is no less acute after than before a strike, and that the need continues until harmony is restored.

The respondent invokes the rule of statutory construction that "laws are not to be considered as applying to cases which arose before their passage". Our decision does no violence to that rule. The case in question is the refusal of the respondent to bargain collectively in late July with its employees. The *Dail-Overland* case (*supra*) cited by respondent is authority for the proposition that an individual does not lose his employee status as long as a strike is current. When Congress passed this Act the strikers had the status of employees. We now hold that a refusal to bargain with such employees after July 5, 1935, the date when the Act was approved, is a violation.

The respondent points to the additional requirement of the definition in the Act to the effect that the individual be one who has not obtained other employment and contends that it does not positively

appear that any of the strikers were still unemployed. It is not necessary that all of the strikers have remained unemployed; those, whatever number, still unemployed were entitled to bargain. There is considerable evidence indicating that many were unemployed. Some of respondent's witnesses solicited over 100 of them to return to the plant, and one of respondent's officers testified that over 200 so returned. Up until July 23rd large numbers of them picketed the plant. When respondent sought to reopen its plant with non-union men, a general strike of all labor in Terre Haute was called. Such a decisive demonstration of sympathy would hardly have been made if the strikers were all employed elsewhere. The many letters sent by the Scale Committee to the respondent both before and after July 23rd, the union's statement in the newspapers as late as August 28 that the strike still continued, all evince an activity and desperate determination inconsistent with employment elsewhere.

We are now brought to the respondent's second contention that the union was seeking to force the respondent to accept a closed shop. This in itself seems irresponsible to the issues but it is probable that the respondent seeks to argue thereby that the union was adamant in its demand for a closed shop; that negotiation was therefore futile; that the possibilities of collective bargaining had been exhausted; and that no settlement of the strike could reasonably have been anticipated.

The specific question to be asked is whether on July 23, 1935 the respondent was justified in believing that further negotiation would be fruitless and settlement of the strike beyond reasonable probability. We think that it is quite clear that the respondent was not so justified.

It is true that on a number of occasions the union made attempts to secure a closed shop or concessions tantamount to a closed shop. It resolved on March 17, 1935, one week prior to the strike, that it would not work with non-members. The respondent claims that furthermore, the closed shop was the only issue. This is not strictly true. It is true that the demand for wage increases was not being strongly pressed; and that the complaint as to the respondent's use of circular letters had been temporarily composed. But the disputes over the application of the two hour minimum pay clause of the Indianapolis agreement and of the application of the arbitration clause to the propositions of January 4th were both mentioned in the union pre-strike resolution of March 17th.

Much more important, however, is the point that after the strike the respondent raised a new issue which precluded the negotiation of any agreement whatsoever. In its letter of May 10th to the Mayor refusing to meet with him and the Scale Committee it announced that the men could come back but without Union recognition or agreement. In its advertisements of June 7th it repeated this stand and again on June 11th it reiterated this in the conference between it and the Scale

Committee. The meeting of June 11th was by no means a clear deadlock on the closed shop issue. The Committee reasserted its demand for a closed shop. The respondent's officers stated that the closed shop could not be granted, that the men could come back but without union recognition and that if they didn't want their jobs back they would get somebody else. According to the respondent's witnesses, the Committee stated at the conclusion that they would come back only on their own conditions but would report the conversation to their constituency and report back to the respondent. It is equally consistent with the facts that this meeting failed by reason of the union's insistence on the closed shop or by reason of the respondent's insistence that it would make no agreement with the union at all.

Between July 19th and 23rd there occurred a series of events which gave the respondent great advantages over its striking employees. Martial law was declared, and picketing was prohibited.

Circumstances had so changed since June 11th that even if at that time the union had clung to its closed shop demand, it was improbable it would do so any longer; the union sought to approach the respondent through conciliators, through persons primarily interested in composing differences; ostensibly its mood was conciliatory, its principal interest in settling the strike. Under all these circumstances, the respondent could not reasonably have believed that collective bargaining would necessarily have been futile. And indeed the respondent, itself, seems on July 23rd to have believed otherwise and to have advised the conciliators that it would meet with the Committee.

That the respondent was under a duty to meet with the Committee, if settlement were possible, seems clear. The Act requires the employer to bargain collectively with its employees. Employees do not cease to be such because they have struck. Collective bargaining is an instrument of industrial peace. The need for its use is as imperative during a strike as before a strike. By means of it, a settlement of the strike may be secured.

It is our opinion that the respondent's refusal to meet with the Committee after it promised to do so, resulted from its realization that it could in any case open its plant and that to do so without dealing at all with the union would discourage active support of the union and render it useless. The respondent since May 10th had by letter, by public advertisement, and by word of mouth stated that it would neither recognize nor make any agreement with the union. In its advertisement of June 11th the respondent stated that for 33 years it had operated without union recognition or agreement, a statement which ignored the Indianapolis agreement and suggested that the respondent did not regard its obligations thereunder seriously. It will be remembered that even this agreement was

won only on threat of strike, that thereafter in negotiation not a single demand of the union was ever granted, that all efforts of the union to strengthen itself were resisted, and that the respondent by its circular notices spoke over the heads of the union to its members. After the strike the respondent gave clear expression to its hostility and took advantage of the situation to make effective this hostility.

During July it solicited the strikers individually to return to work, and told some of them that it would not deal with the union. It secured the aid of the police in opening its plant. On July 23rd it no longer had pickets to contend with and applications for employment were numerous. On the same day it agreed to meet the Committee. Nevertheless, though it was now in contact with its employees' representatives, though negotiations had been initiated looking to the settlement of the strike, the respondent continued to solicit individual employees to return to work and at the same time refused to engage in the negotiations. Thus, the employees had no channel through which to arrange their return to work as an organized group, conformably to the decision of that group. By its tactics, the respondent emasculated the union as an effective instrument of employee representation. We hold that by so doing, it has engaged in unfair labor practices within the meaning of Section 8, subdivisions (1) and (5) of the act. It will be unnecessary to make any decision with respect to the charges of refusal to bargain on September 20 and October 11, 1935. These unfair labor practices have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

A question arises as to the form of relief. It would be futile simply to order the respondent to bargain with the union since the plant now has its full quota of men and the process of bargaining could yield little comfort to those who are not employed; nor do we know whether the union now represents a majority. Under these circumstances we must restore, as far as possible, the situation existing prior to the violation of the Act, in order that the process of collective bargaining, which was interrupted, may be continued.

It is apparent that a number of those who were on strike are still unemployed by the respondent or at substantially equivalent employment elsewhere, and that on the other hand, there are at present employed in the plant a number of individuals who were not so employed at the time of the strike on March 23, 1935.

The purpose of the conference proposed by the conciliators on July 23 was to settle the strike and to put the men back to work. It does not lie in the mouth of the respondent to say that this result would not necessarily have followed. The law imposed a duty to

bargain under these circumstances because that result might have followed. It is respondent's conduct which has precluded that possibility. Therefore, we shall order the respondent to discharge from its employment all production employees who were not employed on July 22, 1935 and reinstate to the vacancies so created individuals who were so employed and have not since received substantially equivalent employment elsewhere.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact, the following conclusions of law are made.

1. The Enameling and Stamping Mill Employees Union No. 19694 (the Union) is a labor organization, as defined in Section 2, subdivision (5) of the Act.

2. All the departments of the Terre Haute Plant of the respondent with the exception of the office and clerical departments constitute a unit appropriate for the purposes of collective bargaining, within the meaning of section 9 (b) of the Act.

3. On or about July 23, 1935, the respondent refused to bargain collectively with the union as the representative of its employees, or at all, and by reason of such refusal has engaged in an unfair labor practice within the meaning of Section 8, subdivision (5).

4. On or about July 23, 1935, the respondent interfered with and restrained its employees in the exercise of their right to self-organization and to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection, as guaranteed by Section 7 of the Act, and by reason of such conduct has engaged in unfair labor practices within the meaning of Section 8, subdivision (1) of the Act.

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

ORDER

On the basis of the findings of fact and conclusions of law and pursuant to Section 10, subdivision (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, the Columbian Enameling & Stamping Company, and its officers and agents, shall take the following action, which the Board finds will effectuate the policies of the Act:

1. Discharge from its employment all production employees who were not employed by it on July 22, 1935, and reinstate to the vacancies so created individuals who were so employed and have not since received substantially equivalent employment elsewhere and place

the remainder of such individuals on a list to be called for reinstatement as and when their labor is needed.

2. Upon reinstating its employees as required in paragraph 1 of this order, shall cease and desist from refusing to bargain collectively with Enameling & Stamping Mill Employees Union, No. 19694 as the exclusive representative of the production employees employed by respondent in respect to rates of pay, wages, hours of employment and other conditions of employment.

3. File with the National Labor Relations Board on or before the thirtieth day from the date of service of this Order, a report in writing setting forth in detail the manner and form in which it has complied with the foregoing requirements.