

In the Matter of THE SANDS MANUFACTURING COMPANY and
MECHANICS EDUCATIONAL SOCIETY OF AMERICA

Case No. C-33.—Decided April 17, 1936

Water Heater Industry—Unit Appropriate for Collective Bargaining: production and maintenance employees—*Representatives:* proof of choice: membership in union—*Collective Bargaining:* refusal to meet representatives; bargaining with individual employees; employer's duty, as affected by temporary shut-down—*Condition of Employment:* join rival union—*Employee Status:* during temporary shut-down; during lockout—*Discrimination:* lockout; non-reinstatement following temporary shut-down—*Reinstatement Ordered—Back Pay:* awarded.

Mr. Nathan Witt and *Mr. Harry L. Lodish* for the Board.

Stanley & Smoyer, by *Mr. W. K. Stanley* and *Mr. Harry E. Smoyer*, of Cleveland, Ohio, for respondent.

Brooker & Brooker, by *Mr. William L. Brooker*, of Cleveland, Ohio, for Mechanics Educational Society of America.

Mr. Joseph Rosenfarb, of counsel to the Board.

DECISION

STATEMENT OF CASE

On October 14, 1935, the Mechanics Educational Society of America, hereinafter called the MESA, filed with the Regional Director for the Eighth Region a charge that the Sands Manufacturing Company, Cleveland, Ohio, hereinafter called the respondent, had engaged in and was engaging in unfair labor practices within the meaning of the National Labor Relations Act, approved July 5, 1935, hereinafter called the Act. On November 12, 1935, the Board issued a complaint signed by the Regional Director for the Eighth Region alleging that the respondent had committed unfair labor practices within the meaning of Section 8, subdivisions (1), (3) and (5) and Section 2, subdivisions (6) and (7) of the Act. The complaint alleges in substance:

1. On or before June 15, 1935, a majority of the employees in the production and maintenance departments of the plant of the respondent had designated the MESA as their collective bargaining representative, and that at all times since the MESA had been the exclusive

representative of the employees in such unit for the purposes of collective bargaining.

2. On June 15, 1935, an agreement for a period to March 1, 1936 was entered into between the respondent and the MESA concerning rates of pay, hours of work and other conditions of employment.

3. On July 23, 1935, August 21, 1935 and on other dates during the months of July and August, 1935 the respondent notified 75 of its production and maintenance employees that their services would not be required during a temporary and indefinite period.

4. On September 3, 1935 the respondent entered into a collective agreement covering rates of pay, hours of employment and other conditions of employment of its production and maintenance employees with the International Association of Machinists for a term beginning September 3, 1935 and ending September 3, 1936.

5. On or about September 6, 1935, and at various times thereafter, the respondent hired in its production and maintenance departments certain persons not theretofore employed by the respondent, and recalled to employment certain of the 75 employees laid off temporarily, but refused to recall to employment 48 of the 75 for the reason that they were members of the MESA and had engaged in concerted activities for the purpose of collective bargaining.

6. The acts of the respondent constitute unfair labor practices affecting commerce, within the meaning of Section 8, subdivisions (1), (3) and (5) and Section 2, subdivisions (6) and (7) of the Act.

The complaint and the accompanying notice of hearing were duly served upon the respondent and upon the MESA. Thereafter the respondent filed its answer to the complaint alleging, *inter alia*, as follows:

1. The National Labor Relations Act is unconstitutional because it violates the 4th, 5th and 10th Amendments to the Constitution of the United States.

2. It is an Ohio corporation, organized in 1913, has its principal office and place of business in the County of Cuyahoga and State of Ohio, and is engaged in the manufacture, sale and distribution of gas and kerosene water heaters. It obtains its raw materials partly from without and partly from within the State of Ohio and its products are shipped to destinations within and without the State of Ohio.

3. The MESA was not the representative for purposes of collective bargaining designated by a majority of the production and maintenance employees but only had the right to accompany the committee chosen by the employees for that purpose in their dealings with the respondent.

4. The employees discharged by the respondent during July and August were dismissed because of lack of work.

5. The shutdown of the plant on August 21, 1935 occurred because the respondent considered the agreement of June 15, 1935 had been violated by the employees' committee.

6. The agreement of September 3, 1935, entered into between the respondent and the International Association of Machinists was not a closed shop agreement and was cancelled by mutual consent of the parties on or about September 10, 1935.

7. Upon the reopening of the plant on or about September 3, 1935, the respondent did not recall to employment a large number of workmen previously employed by it, but with the exception of a few, none of its previous employees had applied to it for reemployment.

8. The respondent did not discharge or refuse to reinstate any employees because they belonged to the MESA and had engaged in concerted activities for the purpose of collective bargaining.

9. The respondent did not commit unfair labor practices within the meaning of Section 8, subdivisions (1), (2) and (3) of the Act.

A hearing commencing November 25, 1935 and continuing to and including November 30, 1935, was held in Cleveland, Ohio, before Saul S. Danaceau, duly designated by the Board as Trial Examiner. Full opportunity to be heard, to cross-examine witnesses and to produce evidence bearing upon the issues was afforded to all parties.

On December 26, 1935 the Trial Examiner duly filed with the Regional Director an Intermediate Report in accordance with Article II, Section 30 of National Labor Relations Board Rules and Regulations—Series 1. The Trial Examiner found, that the respondent had committed unfair labor practices within the meaning of Section 8, subdivisions (1) and (3) of the Act, and recommended that the respondent cease and desist from interfering and coercing its employees in the rights guaranteed by the Act, and reinstate to their former positions the employees discharged, but without back pay. The motions of the respondent to dismiss the complaint made and renewed during the hearing were overruled by the Trial Examiner.

Exceptions to the Intermediate Report were filed by both parties in accordance with Article II, Section 32 of National Labor Relations Board Rules and Regulations—Series 1. Thereafter oral argument was held before the Board at which the respondent participated by its counsel, who also filed a brief.

Upon the entire record in the case, the stenographic report of the hearing and all the evidence, including oral testimony, documentary and other evidence offered and received at the hearing, the Board makes the following:

FINDINGS OF FACT

I. THE RESPONDENT AND ITS BUSINESS

The respondent is a corporation organized in 1913 under the laws of the State of Ohio. It has its principal office and place of business in the City of Cleveland, County of Cuyahoga, State of Ohio. It is engaged in the manufacture, sale and distribution of gas and kerosene water heaters.

The respondent obtains raw materials in the form of brass, castings, sheet iron, steel tanks, tubing, packing material, and miscellaneous other material from Ohio, Michigan, Connecticut, Massachusetts, New York, Illinois, Wisconsin, West Virginia, Virginia and other states. During the period from January 1, 1935 to October 1, 1935, its purchases of raw materials totalled \$181,828.51, of which the purchases from within the State of Ohio totalled \$106,616.31.

The respondent ships and transports tank heaters, storage heaters, instantaneous heaters and valves and other parts produced and sold by it to every state and the District of Columbia. During the period from January 1, 1935 to October 31, 1935, the value of its shipments totalled \$318,117.08, of which shipments within Ohio were \$34,091.17 and those outside of Ohio were \$284,025.91.

The shipments to and from the respondent are by common carrier. Its articles are shipped on consignment to various warehouses, not owned or operated by the respondent, throughout the United States, where they are stored pending the filling of individual orders. The respondent has representatives in various parts of the United States, who, with the exception of the one in New Jersey, are paid by commission.

The advertising of the respondent is on a nationwide scale. During the period January 1, 1935 to October 31, 1935 its disbursements for advertising totalled \$8,750.48.

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

II. THE RELATIONS BETWEEN THE RESPONDENT AND ITS EMPLOYEES—
THE BACKGROUND OF THE LABOR DISPUTE—APRIL, 1934 TO JUNE 15,
1935

Early in 1934 the production and maintenance employees of the respondent became members of the MESA, an independent labor organization with headquarters in Detroit, Michigan. All of the employees of the respondent in the production and maintenance departments, exclusive of supervisory and clerical employees, were eligible for membership in the MESA. In April, 1934, in a letter to the

respondent, 32 of the production and maintenance employees who had joined the MESA, designated a committee of three of their number, Harry Potter, Clarence Dusek and Lada Jindra, to be their representatives for the purpose of collective bargaining, and requested that representatives of the MESA be present at the dealings between the respondent and the committee. These 32 employees constituted practically all of the employees in the plant at that time.

We find that the production and maintenance employees of the respondent constitute a unit appropriate for the purposes of collective bargaining.

After negotiations between the committee and the respondent, an agreement was made on or about May 2, 1934 providing, *inter alia*, for an increase in wages. The agreement was to run for 60 days, but by mutual consent the parties continued to operate thereunder until some time in May, 1935.

In the fall of 1934, while the respondent was endeavoring to obtain a contract with the United States Government for the manufacture of a large amount of merchandise, it obtained a promise from the employees that there would be no labor trouble in the plant to interfere with the filling of the order. About 35 new and additional men were hired to help do the work on the Government order. After the completion of the Government order in December, 1934, these new and additional men were discharged. While employed by the respondent all but 3 of the additional men became members of the MESA.

In the spring of 1934 Harry Potter, who had become state chairman of the MESA, left the employ of the respondent. Tony Moraco, one of the employees of the respondent, supplanted Potter as a member of the shop committee. Potter, however, continued to participate in the negotiations between the respondent and the shop committee as a representative of the MESA.

During the middle of May, 1935, negotiations took place between the respondent and the shop committee concerning a new agreement. The main demand of the employees was for an increase in wages. The negotiations were unsuccessful and a strike was called on May 21, 1935. Negotiations continued during the strike, with the participation of Potter and a United States Department of Labor Conciliator. An agreement was finally arrived at on or about June 1, 1935 and pending the drafting of a written contract the strikers returned to work on June 3, 1935. A dispute arose as to 7 men whom the respondent refused to reinstate on the ground of inefficiency, and on June 6 the men struck again. The respondent's position was that the shop committee agreed to the discharge of the 7 men.

Further negotiations continued which culminated in a written agreement on June 15, 1935, between the respondent and the shop

committee on behalf of the MESA. This agreement called for an increase in wages, and provided that no employees be discharged without a hearing before the management and the shop committee on specific charges. On June 17, 1935 all of the employees, including the 7 whom the respondent had refused to reinstate, returned to work.

It is clear from the evidence that on June 15, 1935, and at all times thereafter, the MESA was the representative of the majority of the respondent's production and maintenance employees.

III. THE LABOR DISPUTE

In order to complete the orders which had accumulated during the strike, the respondent, after the plant reopened on June 17, 1935, hired approximately 30 additional men, some of whom had worked for the respondent while the Government order was being filled, and some of whom were new.

By the middle of July practically all of the accumulated orders had been filled and respondent proceeded to reduce its working force. About July 15, 1935, after conferences between the management and the employees, all the men in the tank heater department with the exception of the foreman were laid off.

In the agreement of June 15, 1935, the 31 men who were employees of the respondent prior to the Government order of 1934 were designated as "old men", and those employed while the Government order was being filled were "new men." About July 30, 1935 a notice was posted on the time clock in the plant of the respondent that the new men would be laid off on July 30 and the old men would be laid off on August 2, 1935. After the layoff of the new men another notice was posted to the effect that the plant would be operated with the old men on a schedule of three days a week.

Thus, by the end of July and the beginning of August, some departments were being operated on a part time basis and others had been practically shut down. At or about this time, the respondent wished to increase the working force in the machine shop, the key department, while at the same time shutting down the other departments. Repeated conferences were held between the management and the shop committee in reference to this matter. The positions of the respondent and the employees were diametrically opposed. The management contended that new men, experienced in machine shop work, be employed in preference to the old men. The shop committee contended that there was sufficient stock in the machine shop, and that in any event, under the agreement of June 15, 1935, the respondent could not hire any new men for the machine shop as long as old men were still laid off. The management claimed that the shop committee

was insisting upon a violation of Article 5 of the agreement. The pertinent articles of that agreement are:

"5. That when employees are laid off, seniority rights shall rule, and by departments.

"6. That when one department is shut down, men from this department will not be transferred or work in other departments until all old men only within that department, who were laid off, have been called back.

"7. That all new employees be laid off before any old employees, in order to guarantee if possible at least one week's full time before the working week is reduced to three days."

For many years both before and after the organization of the employees, it had been the practice at the plant of the respondent to transfer men from one department to another. This practice prevailed even after June 15, 1935. In this connection it should be noted that when men were transferred from one department to another they continued to receive their normal wages irrespective of the work done. Wages of employees of respondent depended on length of service.

The discussions between the management and the shop committee continued until about August 19, 1935, when the shop committee was given the alternative between consenting to an increase in working force of the machine shop with new men and a temporary shutdown in the other departments, on the one hand, and a temporary complete shutdown of the plant on the other. The shop committee was asked to consult the men and advise the management which of these alternatives they preferred. On August 21, 1935, another meeting took place, at which time the committee informed the management that the men considered a temporary complete shutdown of the plant as the preferable course. The same day the management placed a notice on the time clock reading: "The factory will shut down Wednesday night, August 31st, until further notice"—and the plant was closed.

On or about August 26th or 27th, Garry Sands, secretary-treasurer of the respondent during all of the occurrences in this case, and Hilliard J. Sands, superintendent, went to the office of the business agent of the International Association of Machinists, and negotiated an agreement between the respondent and the International Association of Machinists, District No. 54, which was executed on or about August 31st and became effective September 3rd. Garry Sands testified that he was advised to take this step by a friend who had a similar agreement with that union. The respondent opened its plant on September 3rd. In order to do so it sent telegrams to each of its workers, almost all new men, who were members of the International Association of Machinists, and in addition called upon the Cuyahoga County

relief organization to supply additional workers. The International Association of Machinists also supplied the respondent with new help.

With the exception of four men, none of the old men, members of the MESA, was called back to work by the respondent. Two of the four, Stanley Linsky and Frank Pansky, after being sent for by the respondent on August 30th, were offered employment on the basis of reduced hourly wages with increased rates at later dates and with guaranteed steady work. They were told to think it over and to come back September 4th. Linsky testified that when he came back September 5th, Garry Sands repeated his offer concerning the wages but told him that if he wanted to work he would have to join the International Association of Machinists and would be given protection against harassment by MESA men. Garry Sands denied that he made joining the International Association of Machinists a prerequisite to getting work but admitted the rest of the conversation.

Pansky testified that when he came back September 4th, the wage offer was repeated. He also testified that he was told by Garry Sands that he would have to join the International Association of Machinists if he wanted to get the job, and that the rest of the old men would not be recalled to work because their hourly rates were too high. Garry Sands expressed satisfaction with the agreement with the International Association of Machinists, gave Pansky a blank for application to the International Association of Machinists to sign, and said that if Pansky worked for the rest of the afternoon he would have enough for initiation fees. He also told Pansky that the agreement of June 15th was invalid because Potter had not signed it. Pansky filled out the application blank but did not work that afternoon. Garry Sands' version of the conversation is substantially the same, except that he denied having said that Pansky would have to join the International Association of Machinists in order to get the job, and that he did not want the rest of the old men back. He further testified that he procured the application blank for Pansky when the latter expressed a desire to join the International Association of Machinists, having heard from him, Sands, that the members of the International Association of Machinists who were working were getting protection. Sands also testified that his reference to the invalidity of the agreement of June 15th was on the ground that the old men had broken the agreement. However, Hilliard J. Sands, who was present at these conversations, admitted in his testimony that Garry Sands told Pansky, Linsky, Dolish and Ochs, the four men who were called back, that the offer of reemployment was being made only to them and not to the rest of the old men.

None of the four, however, went back to work. A few of the old men asked respondent for work after the plant reopened, but were told that their places were taken.

When the MESA men discovered that the plant of the respondent was in operation, they met with Harry Potter who communicated by telephone with Garry Sands in behalf of the shop committee. Potter protested against the lockout of the old men. He testified that in the course of this telephone conversation, he asked for a meeting with the management, but Garry Sands refused and claimed that the agreement of June 15th was invalid because Potter had not signed it. Garry Sands admitted that Potter had called him, but denied that Potter had asked for a meeting. He testified that when Potter threatened to have the plant picketed and to file charges under the Act, he replied that the old men broke the agreement of June 15th. Pansky testified that he heard Potter ask Garry Sands to meet with him or with the committee. The MESA men then immediately started to picket the plant and continued their picketing during the month of September. The plant continued in operation during the picketing.

On or about September 10, 1935, at the request of the respondent, the agreement between it and the International Association of Machinists, District No. 54, was cancelled by mutual consent of the contracting parties. Garry Sands testified that he decided to have the agreement cancelled because he was apprehensive of the consequences which might follow from the filing of a charge under the Act. However, the present employees continue to work under the same terms as in the written agreement, at a wage scale considerably lower than that under which the old men had worked.

IV. THE UNFAIR LABOR PRACTICES

To the complaint that the respondent has committed unfair labor practices within the meaning of Section 8, subdivisions (1), (3) and (5), the following contentions are made in behalf of the respondent, aside from the arguments on constitutional grounds:

1. The old employees wilfully violated the agreement of June 15, 1935 in respect to shifting employees from one department to another.
2. Even if there was an honest difference of opinion on the construction of that agreement, the respondent and the old employees reached an impasse in their negotiations. The respondent was therefore not obligated to continue negotiations and was further justified in replacing the old employees with new ones.

In the course of the dispute which arose after June 17th between the respondent and the shop committee concerning building up the force of the machine shop, the committee took the position that it would not be a violation of the agreement of June 15th to transfer old men who had been laid off to the machine shop, if they could do the work, before new men were hired.

It is true that the phrase "and by departments" was added to Article 5 when it was originally submitted by the men in the following form: "That when employees are laid off, seniority rights shall rule." However, this was not integrated with Article 7 which provided: "That *all* new employees be laid off before *any* old employees, in order to guarantee if possible at least one week's full time before the working week is reduced to three days." The operation of Article 7 is not limited to departments. Yet it deals with the same subject as Article 5. It is clear that the shop committee was not unreasonable in contending that the preference to old men over new men applied to the whole plant and not only to departments. Besides, the problem was complicated by the fact that the dispute over building up the machine shop involved seniority in hiring as well as in laying off, while the two articles involved state the rule of seniority only in laying off. The confusion on the point is abundantly evident in the testimony of the old men, so much so, that counsel for the respondent, by resorting to a mixture of hypothetical and factual questions in his cross-examination of them, confused rather than clarified the record.

Because of its importance in explaining the respondent's conduct during and following the closing of the plant on August 21st, the reason for the opposition of the respondent to the transfer of old men from other departments to the machine shop must be explored. Garry Sands claimed that the opposition was based on inefficiency of the transfer system. However, in view of all the circumstances the claim is not convincing. The shop of the respondent appears to be highly mechanized and the individual operations correspondingly simplified. A complete set of new men were broken in for the Government order in 1934 without any apparent difficulty. No efficiency records were introduced, and apparently none were kept. Employees were transferred from one department to another over a period of years both before and after the organization of the MESA, and most of the old men had worked in the machine shop at some time or other. No evidence of persuasive materiality was introduced by the respondent to substantiate the claim that the old men were unsatisfactory when transferred from one department to another. In fact, the respondent failed to put in evidence showing that any particular old men were inefficient when transferred.

In this connection, the case of Jack Norman may be cited. He was one of the 7 whom the respondent refused to reinstate on June 3rd. He was later discharged on the ground of inefficiency. When all the facts were put before the shop committee, it consented to the discharge. It is true that Norman's case did not arise because of a transfer. However, the evidence tends to show that the shop com-

mittee would have been reasonable if the respondent had in good faith attempted to show in specific cases that the transferring of men resulted in inefficiency. There is no evidence to show that the respondent had ever attempted to do so.

Other evidence bearing on the subject of efficiency would show the old men to better advantage than the new men. Charles Rudd, the foreman of the tank heater department, testified that in the spring of 1935 with 8 old men in the department, 850 to 909 heaters were the daily average, while in July, 1935, with only 2 old men, and with the remainder new men, the highest number per day was 790. Finally, no consideration of efficiency and experience deterred the respondent from calling on the Cuyahoga County relief organization for a supply of workers when the plant was reopened in September.

Rates of pay in the respondent's plant depended on length of service and not on the nature of the work. Thus, when old men were transferred to any department, they continued to receive higher rates than younger men in the same department. We are inclined to believe that the impelling motive for the opposition of the respondent to transferring the old men to the machine shop instead of hiring new men lay in this fact. In fact, Garry Sands testified that after the shutdown of August 21st, he complained to Albert Farrell, one of the old men, about the unfairness of transferring men receiving high wages to do work which could be done by men receiving much less.

Although the Board is of the view that an honest difference of opinion existed on the construction of the June 15th agreement, the case against the respondent is not in any way prejudiced if the stand of the shop committee in resisting the demand of the respondent to build up the machine shop with new men instead of with old men is considered a violation of the agreement. After the shutdown of August 21, 1935 the old MESA men continued to be employees of the respondent irrespective of the cause of the shutdown. The National Labor Relations Act makes no distinction based on the issues involved in labor disputes. An "employee" under Section 2, subdivision (3) of the Act includes "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." Moreover, after the shutdown on August 21st, inasmuch as the MESA still represented a majority of the employees in an appropriate unit, it was, by virtue of Section 9(a) of the Act, the exclusive representative of the employees for purposes of collective bargaining. The respondent, therefore, could not alter the status quo without bargaining with the MESA. Instead of bargaining with the MESA, however, the respondent entered into an agreement with a union which did not rep-

resent its employees, and thereupon discharged the members of the MESA.

The contention the respondent makes, however, is that its negotiations with the committee had reached an impasse at the time of the shutdown and further negotiations would have been futile unless the respondent were prepared to accede to the committee's demands.

It is hardly necessary to state that from the duty of the employer to bargain collectively with his employees there does not flow any duty on the part of the employer to accede to demands of the employees. However, before the obligation to bargain collectively is fulfilled, a forthright, candid effort must be made by the employer to reach a settlement of the dispute with his employees. Every avenue and possibility of negotiation must be exhausted before it should be admitted that an irreconcilable difference creating an impasse has been reached. Of course no general rule as to the process of collective bargaining can be made to apply to all cases. The process required varies with the circumstances in each case. But the effort at collective bargaining must be real and not merely apparent. This could hardly be said of the conduct of the respondent in this case. The respondent was not justified in not negotiating with the committee after the shutdown of the plant. The closing of the plant on August 21st was only "until further notice," as the notice posted on the time clock by the respondent explicitly stated. Nothing was said by Gary Sands or anybody else in behalf of the respondent to the committee which would have indicated that the closing of the shop meant that the old employees would not be recalled. It is inconceivable that the committee would have accepted this, especially since the men had been so successful when they struck a few months earlier.

Furthermore, a new issue arose after the shutdown which completely overshadowed the issue of building up the machine shop. The respondent wished to reduce the wage rates of its employees with guaranteed steady work. Why did not the respondent notify the committee of this new offer? There was no reason to believe that the committee would not have considered it. As a matter of fact, the respondent thought well enough of the proposition to offer it to four of its old men.

A meeting with the respondent was asked for by Potter in behalf of the committee on September 4th, but Garry Sands refused. Indeed, there was no obligation on the employees to ask for a meeting. Since the plant was closed until further notice and the respondent changed its position on the wage rates, the duty devolved upon the respondent to advise the committee of the new offer. Instead, the respondent surreptitiously entered into negotiations to replace the

MESA men with a new set of men at lower wages, some of them belonging (in the opinion of its secretary-treasurer) to a mere conservative union. This conduct is not compatible with a sincere effort to bargain collectively with one's employees.

We fail to see in the respondent's conduct anything other than a refusal on its part to bargain collectively with the representative of its old employees. This, especially in conjunction with the negotiations of the respondent with the four men individually, constituted a violation of the respondent's duty to bargain collectively with the representative of its employees.

We are the less hesitant in reaching this conclusion because the record shows that following the strikes in May and June, the respondent had become antagonistic to the MESA. Thus, when, late in July, Charles Rudd, an old MESA man, complained to Hilliard J. Sands, the superintendent, that the MESA men were being intimidated while new men were being asked to join the International Association of Machinists within 15 days after they began to work, contrary to an oral understanding with the management, Sands replied that the management would rather have the International Association of Machinists than the MESA because the former was more conservative and did not call strikes often. Likewise, after Jack Norman was dismissed about June 26, 1935 for incompetency, he was told by Edward McKiernan, assistant superintendent, not to worry, that he would be taken back as soon as the respondent was rid of the MESA.

The whole conduct of the respondent leaves no other reasonable inference than that the old employees were locked out, discharged and refused employment because they were members of the Mechanics Educational Society of America and had engaged in concerted activities for the purpose of collective bargaining.

By failing to recall its employees who were members of the Mechanics Educational Society of America, and by requiring that four of them join the International Association of Machinists as a condition of employment, the respondent discriminated against its employees in regard to tenure of employment, and thereby discouraged membership in the Mechanics Educational Society of America, a labor organization.

By refusing to bargain collectively with the representative of its employees, and by discriminating against its employees in regard to tenure of employment, the respondent interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The men discharged were: Tony Avon, Clarence Ball, Joseph Blaha, William Brandt, Frank Dolish, C. J. Dusek, Albert Farrell, H. H. Garms, John Greeley, Mike Hudak, Lada Jindra, Leo Kahn,

Stanley Linski, H. J. Meyer, Tony Moraco, Martin Moritz, Louis Nagy, Elmer Ochs, Frank Pansky, John Pansky, John Popp, C. E. Rudd, Ed. Stack, Joe Swancer, Emil Tulow, W. Bakum, Charles Becks, Joseph Bondra, Stanley Dymidowski, Max Feinstein, Carl Frank, Robert Herman, Robert Hronek, Myron Kanner, Emmett Kenna, Joseph Kozlowski, Willard Kraus, Louis Meyers, John Patchford, Henry Schilthorn, George Sevcik, William Sumanek, John Sweitzer, Harold Wenger, Matthew Wiersch, Clarence Wisniewski, Joseph Wycickowski.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON INTERSTATE COMMERCE

The respondent contends that since the picketing which took place after its plant was reopened in September did not interfere with the operations of its plant, and commerce was therefore in no wise affected, the Board has no jurisdiction. The remedy provided by the Act is preventive. There is therefore no necessity that an actual obstruction to commerce exist in each case before the Board assumes jurisdiction. It is sufficient if the acts of the respondent lead or tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. Furthermore, during the strikes in May and June, 1935, the plant of the respondent was completely shut down.

We find that the aforesaid acts of the respondent have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

In administering the remedies provided by the Act, and wishing to protect the right to collective bargaining of the employees of the respondent who were locked out and discriminatorily discharged, the Board considers it imperative that these employees be reinstated to employment by the respondent on the same basis as to wages and other conditions of employment that existed prior to August 21, 1935, with back pay from September 3, 1935, when the plant reopened, to the date of offer of such reinstatement, less amounts earned by each during such period.

CONCLUSIONS OF LAW

Upon the basis of foregoing findings of fact, and upon the entire record in the proceeding, the Board finds and concludes as a matter of law:

1. The production and maintenance departments of the plant of the respondent constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

2. The Mechanics Educational Society of America is a labor organization within the meaning of Section 2, subdivision (5) of the Act.

3. By virtue of Section 9 (a) of the Act, the Mechanics Educational Society of America, having been designated as their representative for the purposes of collective bargaining by a majority of the employees in an appropriate unit, was the exclusive representative of all the employees in such unit for the purposes of collective bargaining.

4. The respondent, by refusing to bargain collectively with the representative of its employees, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (5) of the Act.

5. The respondent, by discriminating in regard to tenure of employment, and thereby discouraging membership in the Mechanics Educational Society of America, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (3) of the Act.

6. 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, subdivision (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting 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(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Sands Manufacturing Company, and its officers, shall:

1. Cease and desist:

(a) from 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 the purpose of collective bargaining or other mutual aid or protection;

(b) from discouraging membership in the Mechanics Educational Society of America by discrimination in regard to tenure of employment or any term or condition of employment; and

(c) from refusing to bargain collectively with the Mechanics Educational Society of America as the exclusive representative of all its production and maintenance employees, other than those engaged in a supervisory or clerical capacity, for the purpose of collective

bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

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

(a) offer to all of the employees listed in part IV of the findings of fact immediate and full reinstatement, respectively, to their former positions with all the rights and privileges previously enjoyed;

(b) make whole said employees for any losses of pay they have suffered by reason of their discharge by payment, respectively, of a sum of money equal to that which each would normally have earned as wages during the period from September 3, 1935 to the date of offer of reinstatement, computed at the wage rate each was paid prior to discharge, less the amount which each may have earned during such period; and in the event of any dispute as to the amount due, the dispute shall be laid before this Board, for determination within the terms set forth in this Order; and

(c) upon request, bargain collectively with the Mechanics Educational Society of America as the exclusive representative of all its production and maintenance employees, other than those engaged in a supervisory or clerical capacity, for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.