

In the Matter of THE LOUISVILLE REFINING COMPANY and INTERNATIONAL ASSOCIATION, OIL FIELD, GAS WELL AND REFINERY WORKERS OF AMERICA

Case No. C-177.—Decided January 12, 1938

Oil Refining Industry—Interference, Restraint, or Coercion: expressed opposition to labor organization; questioning employees regarding union affiliation and activity—*Discrimination:* discharges—*Unit Appropriate for Collective Bargaining:* production employees—*Representation:* proof of choice, applications for membership in union—*Collective Bargaining:* meeting with representatives, but with no intention of bargaining in good faith; refusal to negotiate with representatives; solicitation of individual employees to return to work on basis of company policy rejected by union representatives; change to eight-hour schedule without consulting union representative who was attempting to negotiate on that subject—*Strike:* result of employer's unfair labor practices—*Employee Status:* employees discharged; strikers—*Reinstatement Ordered:* employees discharged; strikers upon application for reinstatement—*Back Pay:* awarded, employees discharged; strikers, from date of denial of application for reinstatement.

Mr. Philip G. Phillips for the Board.

Mr. Charles I. Dawson, Mr. Robert B. Hobson, and Mr. Ernest Woodward, of Louisville, Ky., for the respondent.

Mr. Henry W. Lehmann, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF CASE

Upon charges duly filed by International Association, Oil Field, Gas Well, and Refinery Workers of America, herein called the Union, the National Labor Relations Board, herein called the Board, by the Acting Regional Director for the Ninth Region (Cincinnati, Ohio), issued its complaint dated March 20, 1937, against The Louisville Refining Company, Louisville, Kentucky, herein called the respondent, alleging that the respondent had committed unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and accompanying notice of hearing were duly served upon the parties.

The complaint alleged in substance (1) that the respondent on or about February 17, 1937, discharged 23 of its employees for joining and assisting the Union; (2) that on January 15, 1937, and thereafter, the Union was designated by a majority of the respondent's employees as their representative for the purposes of collective bargaining; (3) that on or about January 21 and 22, 1937, and thereafter, the respondent refused to bargain with the Union as the exclusive representative of its employees who constituted a unit appropriate for the purposes of collective bargaining; (4) that the result of the discharges and of such refusal to bargain collectively with the Union was a strike at the respondent's plant in Louisville, Kentucky, which began on or about March 1, 1937; (5) and that the respondent has advised its employees that if they ceased their union activities their salaries would be raised, has uttered false and malicious statements concerning the Union and its officials, has told its employees to form a company union, and has employed armed guards to intimidate its employees to desert the Union.

The respondent filed an answer to the complaint admitting the correctness of the description of the general nature of its business as given in the complaint, and admitting that it buys some of its raw material from States other than Kentucky, causes such raw material to be transported to its plant in Louisville, Kentucky, by barge upon the Ohio River, and continuously sells and causes to be transported in interstate commerce some of its manufactured products, but denying that such acts constitute a continuous flow of trade, traffic, or commerce among the several States. The answer also denies that the respondent has committed the alleged unfair labor practices.

At the same time, the respondent filed a motion to dismiss the complaint upon the ground that the Board has no jurisdiction over the respondent or the subject matter of the complaint.

Pursuant to the notice, a hearing was held in Louisville, Kentucky, on April 1, 2, 5, 6, 7, and 8, 1937, before Emmett P. Delaney, the Trial Examiner duly designated by the Board. The Board and the respondent were represented by counsel. At the commencement of the hearing, counsel for the respondent again presented the motion to dismiss the complaint upon the grounds set forth in the written motion. Ruling on this motion was reserved by the Trial Examiner. At the close of the Board's case and again at the close of all the testimony, the respondent renewed its motion to dismiss. Rulings on these motions were also reserved. On motion to counsel for the Board, the complaint was amended to strike therefrom the name of James Goss. Counsel for the Board also moved to amend the complaint by including the name of Michael Feeney as one of the re-

spondent's employees who had been discharged because of his membership in the Union. Ruling was reserved on the motion. At the close of the Board's case, counsel for the Board moved that the pleadings be conformed to the evidence. This motion was granted. During the course of the hearing the Trial Examiner made numerous rulings on other motions and on objections to the admission of evidence. The Board has reviewed these rulings of the Trial Examiner and finds that no prejudicial errors have been committed. The rulings are hereby affirmed.

Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues, was afforded to all parties.

Subsequently the Trial Examiner filed an Intermediate Report denying the motions of the respondent to dismiss the complaint; granting the motion of counsel for the Board to amend the complaint by including Michael Feeney's name as one of the respondent's employees who had been discharged because of his membership in the Union; and dismissing without prejudice the complaint as to M. Clagett, John Gaskell, Frank Jarrell, and Ray Judy, on the ground that no testimony was offered in respect to them. The Trial Examiner found that the respondent had committed unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act and recommended reinstatement and back pay with respect to the employees of the respondent named in the complaint, other than those employees named above as to whom the complaint was dismissed. Exceptions to the Intermediate Report and to the record were thereafter filed by the respondent. The respondent also filed a brief in support of its exceptions to which we have given due consideration.

Although certain of the findings of the Trial Examiner in his Intermediate Report are in error, we find that the evidence supports the conclusions reached by the Trial Examiner therein that the respondent had engaged in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act. However, for reasons set forth below, we find that the Trial Examiner erred in dismissing the complaint as to M. Clagett and in finding that Hubert Burns was discharged for union activities.

On July 22, 1937, a petition, signed by 61 of the 63 employees alleged by the petition to be then in the employ of the respondent, was filed requesting the Board not to order the respondent to recognize the Union as the bargaining agency of the employees of the respondent. Although this petition is not a part of the record made at the hearing it has received consideration.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent, The Louisville Refining Company, is a Delaware corporation, incorporated on November 21, 1927, having its principal offices and its manufacturing plant located in Louisville, Kentucky. The officers of the respondent are: Eli H. Brown, Jr., president; J. Fred Miles, vice president and general manager; H. R. Smith, secretary-treasurer; William Waples, assistant secretary-treasurer; and R. D. Scott, assistant sales manager. The respondent is engaged in the business of refining crude oil and its products are gasoline, kerosene, fuel oil, and gas oil. It also produces some asphalt.

The plant of the respondent is located on a tract of land 44 acres in extent. The equipment consists of two Dubbs cracking units, a tube still, and a boiler plant. Between 12 and 15 tanks used for storage purposes are located on the land. The storage capacity of these tanks is as follows: Crude oil, three tanks with a capacity of 55,000 barrels each; gasoline, 65,000 to 70,000 barrels; kerosene, 3,500 barrels; gas oil, 40,000 barrels; fuel oil, 45,000 barrels. In addition, the respondent has working tank space amounting to 10,000 barrels. It also owns some tanks in Cincinnati, Ohio, located on land leased from the Tressler Oil Company. In these it stores gasoline which has been shipped to Cincinnati by barge. The storage capacity of these tanks is 20,000 barrels.

Prior to the alleged unfair labor practices the respondent employed between 80 and 85 production employees in Louisville, Kentucky, exclusive of foremen. At the time of the hearing it employed 61 men, exclusive of foremen. Although employees are occasionally sent to Cincinnati, Ohio, and elsewhere to do work, they ordinarily perform their duties in Louisville, Kentucky. Some of the respondent's employees have also made repairs on barges of the Producers' Pipe Line Company, but witnesses for the respondent testified that the men, when thus employed, were paid by that company for their work in repairing the barges, and not by the respondent.

The principal raw product used by the respondent is crude oil. The capacity of its plant is about 100,000 barrels of crude oil per month, all of which the respondent purchases from the Producers' Pipe Line Company. In 1936, its purchases of crude oil amounted to 1,315,046 barrels. About 92 per cent of this oil originates in the fields of Western Kentucky. The remaining eight per cent originates in Indiana. The Producers' Pipe Line Company receives all this oil at Owensboro, Kentucky, and from there loads it on its own barges or those of the Cosmos Pipe Line Company. It thus transports the oil to Louisville, Kentucky, where it is unloaded at the respondent's landing dock by pipe line and pumped into the storage

tanks of the respondent. Employees of the respondent are employed in unloading and pumping the crude oil into the storage tanks where it rests prior to processings.

The respondent uses other raw materials which are purchased in smaller amounts. In 1936, it purchased 289,000 gallons of benzol which were obtained in the Pittsburgh district, and 40,000 barrels of natural gas which came in part from Winchester, Kentucky, and in part from West Virginia. The respondent also purchases small amounts of soda ash, naphtha, caustic soda, litharge, and sulphuric acid.

The process of refining crude oil is a continuous one and the respondent's plant operates on a 24-hour basis. The crude oil is pumped from the storage tanks into the tube stills where, as it flows through, it is heated. It then flows to fractionating towers where gasoline, kerosene, gas oil, and fuel oil, which are the different products of the crude oil, are separated. These products are then pumped into run down tanks where they are stored. The different products subsequently receive further processing. Thus gasoline is sweetened at the treating plant for the purpose of improving its odor, and kerosene is pumped to agitators where it is treated with sulphuric acid. The respondent's sales of gasoline average between 50,000 and 60,000 barrels per month.

The respondent's products are shipped from its plant in tank cars by railroad and by barges on the Ohio River. Those of its products which are transported to Cincinnati, Ohio, by barge are hauled on barges of the Producers' Pipe Line Company at the rate of three-tenths of one cent per gallon. Approximately one-third of its gasoline is shipped to its tanks in Cincinnati to await distribution there. The respondent has no facilities of its own for the transportation of its products.

In August 1936, a representative month, the respondent shipped its products from Louisville, Kentucky, to different States in the following amounts measured in gallons:

	Kentucky	Indiana	Ohio
Gasoline -----	935, 529	525, 287	488, 000
Kerosene -----	88, 000	24, 000	None
Gas oil -----	48, 000	72, 000	32, 000
Fuel oil -----	48, 000	24, 000	1, 104, 000

Occasional small shipments are made to other States but these are insignificant in amount.

It was testified that the respondent is the largest oil refinery in Louisville, Kentucky.

II. THE UNION

International Association, Oil Field, Gas Well and Refinery Workers of America, affiliated with the Committee for Industrial Organi-

zation, is a labor organization which admits to its membership production employees in oil refineries.

III. THE BACKGROUND OF THE UNFAIR LABOR PRACTICES

The employees of the respondent first began to organize in December 1936. Earlier there appears to have been some dissatisfaction among them over their wages. In the spring of 1936, a group of employees had asked to be permitted to speak about their wages to J. J. Loudermill, the general superintendent. They were told that Loudermill would prefer to see them one at a time in the office rather than as a group. Nothing further appears to have transpired at this time. During the summer of 1936, the extra rate previously paid for overtime was eliminated. In November 1936 the question of wages arose again. One of the employees, who became secretary-treasurer of Local No. 211 of the Union subsequently formed among the respondent's employees, was told when he requested a wage increase, that a new rate schedule had been drafted which awaited the approval of Miles, vice president of the respondent. However, no revision of the wage rates appears to have taken place.

On December 3, 1936, the first application cards of the Union were signed. Subsequently, those who had signed up and wanted to form a local union applied to International Association of Oil Field, Gas Well and Refinery Workers of America for a charter. On about December 18 or 20, R. H. Stickel, a representative of the Union, came to Louisville, Kentucky, to install the group as Local No. 211 of the Union, herein called the Local, and to present it with a charter. At this meeting temporary officers were elected. Sometime in the middle of January, L. R. Lockard, the secretary-treasurer, notified officers of the Union that a majority of the respondent's employees had become members of the Local and that they desired assistance from the Union in the negotiations contemplated with the respondent. On January 18, 1937, Stickel returned to Louisville to aid the Local in its efforts at collective bargaining.

Stickel advised officers of the Local to call a special meeting for the purpose of determining what requests should be presented to the respondent in the negotiations. At the meeting held on January 18, 1937, a committee was selected to draft an agreement. On January 30, 1937, a second meeting was held at which the proposed draft of an agreement was presented by the drafting committee to the Local. The draft was read and discussed and certain changes were made. Two members were then designated to obtain an appointment with the officers of the respondent. They telephoned Eli H. Brown, Jr., president of the respondent, who agreed to meet with members of the Union the following morning.

Officers of the respondent were cognizant of the existence of the Union among the employees. Sometime in the middle of January, Brown addressed the employees at two meetings arranged to enable the men on the different shifts to attend. He reviewed the financial status of the respondent and then stated that he did not care whether the men belonged to a union but that he preferred to deal with local people and thought the men should have a "company union."

At the end of one of these meetings, he called aside W. F. Holz, president of the Local, and asked him what the grievances of the men were, and what the purpose of the Union was. According to the testimony of Holz, Brown said that he would not force any of his old employees to join a union and reiterated his own preference for a "company union."

There is evidence to indicate that some of the respondent's supervisory employees were on occasion outspoken in their animosity toward any union organization of the men. Holz testified that in December, Green, foreman in charge of the laboratory, told him that Hanley, another foreman, had declared his intention of discharging an employee for not telling what he knew about the Union. Green also told Holz that Loudermill had asked him if he could dispense with one of his men who, he asserted, had engaged in union activity. Raymond Williams, a charter member of the Local, testified that at some time after the men began to organize, Loudermill called him into the office and questioned him as to whether he belonged to the Union. Loudermill said that he understood Williams was trying to organize the men and that "he thought it was the wrong thing to do." Williams was asked by Loudermill to "go out and talk to the boys, and see if you can't get them to quit organizing, and forget it." Sometime later he was also told by Hanley that Miles had ordered Hanley to discharge Williams but that he had refused to do so on the ground that Williams was a good man.

So much for the background. We turn to a consideration of the alleged unfair labor practices themselves.

IV. THE UNFAIR LABOR PRACTICES

A. *The refusal to bargain collectively*

1. The appropriate unit

The complaint alleges that the refinery employees of the respondent at the Louisville plant constitute a unit appropriate for the purposes of collective bargaining. The respondent did not offer any evidence showing that any other unit is the proper one. The production employees of the Louisville plant are eligible to membership in the Union. All are engaged in the production of gasoline, kerosene, fuel oil, gas oil, and similar refinery products.

We find that the refinery employees of the respondent in the Louisville plant, except supervisory employees, constitute a unit appropriate for the purposes of collective bargaining, and that said unit will insure to the employees the full benefit of their right to self-organization and to collective bargaining, and otherwise effectuate the policies of the Act.

2. The representation by the Union of a majority in the appropriate unit

As already indicated, the respondent employed between 80 and 85 production employees in January 1937.¹ Lockard, the secretary-treasurer of the Local, offered in evidence 58 signed application cards. Of these, one was signed by a man not in the employ of the respondent, and another was dated March 26, 1937, a time subsequent to the conferences in January, February, and March, 1937, at which the alleged refusals to bargain occurred. All other cards are dated January 18, 1937, or prior thereto, and signed by men at that time in the employ of the respondent. These 56 application cards were classified as follows: 47 cards are those of men who have paid the complete fee;² five are those of men who have only paid the initiation fee;³ three are those of men who have not paid any fees but merely signed the application cards;⁴ and a single card is that of a man employed by the respondent who applied for a transfer from another union local to Local No. 211.⁵

It was testified at the hearing that approximately one week prior thereto, Charles Fannin, an employee of the respondent, had signified to Lockard his desire to withdraw from the Local. Inasmuch as this resignation took place several weeks after the period within which the alleged refusal to bargain collectively took place, it does not affect the majority had by the Local during that period. Lockard, when questioned, stated that no other members had notified him of their withdrawal from the Local. Seven members of the Local, in addition to Fannin, testified on behalf of the respondent, and several stated that they no longer considered themselves members of the Union. Inasmuch as even with the exclusion of these seven employees, 49 of the respondent's employees, or a majority thereof, appear to have designated Local No. 211 as their representative at the time of the alleged refusal to bargain collectively, we do not find

¹ Lockard testified that he thought the respondent had approximately 82 employees at that time. Loudermill testified that, exclusive of foremen and other supervisory employees, the respondent had perhaps between 80 and 85 men on its pay roll in January. Upon the basis of this testimony, we find that the respondent had not more than 85 employees, exclusive of supervisory employees, on January 15, and thereafter.

² Board's Exhibit No. 4

³ Board's Exhibit No. 5.

⁴ Board's Exhibit No. 6

⁵ Board's Exhibit No. 8.

it necessary to determine whether the conduct of these seven men at any time constituted a revocation of such authority.

In its exceptions to the Intermediate Report and to the record, the respondent states that while the evidence shows that a majority of the respondent's employees are members of the Union, it fails to establish that a majority of its employees or of those of its employees who are members of the Union had designated the Union as their representative for the purposes of collective bargaining. It apparently seeks to distinguish between membership in a labor organization and the designation of such an organization as bargaining agent, and to argue that membership in itself does not signify the desire to be represented by the organization. In reply to an identical argument advanced in *Matter of Campbell Machine Company, David C. Campbell and George E. Campbell, co-partners, trading as Campbell Machine Company and International Association of Machinists, Local No. 389, Shipwrights, Boatbuilders and Caulkers, and International Brotherhood of Electrical Workers, Local No. 569*,^{5a} the Board stated:

Since the primary and well known function of labor organizations, including the unions in the present case, is collective bargaining, the Board believes no such distinction can be drawn. By voluntarily joining a labor organization an employee in effect designates that labor organization as his representative for the purposes of collective bargaining.^{5b}

We find that on January 18, 1937, and at all times thereafter the Union was the duly designated representative of the majority of the employees in the appropriate unit, and pursuant to Section 9 (a) of the Act was the exclusive representative of all the employees in such unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

3. The refusal to bargain

On January 21, 1937, at about 9:30 a. m., Stickel and a committee composed of some six or seven members of the Local⁶ met Brown and other officials of the respondent,⁷ pursuant to the appointment made the previous night. Stickel presented to Brown the proposed agreement⁸ which the Local had approved in its meeting.

^{5a} 3 N L R. B. 793.

^{5b} Also see *Matter of Star & Crescent Oil Co., a California Corporation, doing business as San Diego Marine Construction Company and International Association of Machinists, Local No. 389; Shipwrights, Boatbuilders and Caulkers; and International Brotherhood of Electrical Workers, Local No. 569*, 3 N. L. R. B. 882

⁶ Among those present at the meeting representing the Local were the following employees: Lockard, Newton, Linzay, Johnson, Ray Judy, and H. D. Rankins.

⁷ Mr. Waples and Loudermill were present with Brown:

⁸ Board's Exhibit No. 1, Document A.

As we have stated above, the Union was then entitled to act as exclusive representative of all the employees. The respondent asserts that it was under no duty to bargain collectively with Stickel and the Union inasmuch as it did not know whom Stickel represented and whether he and the Union represented a majority of the employees. Although, according to his testimony, Brown did ask Stickel at the first three meetings for a list of names of union members and how many employees were members of the Union and challenged Stickel's authority to represent the employees, he failed to maintain the position that he would refuse to deal with Stickel in the absence of evidence as to Stickel's authority. On the contrary, Brown continued meeting with the Union and discussed other matters, as set forth hereinafter.

Testimony by W. C. Burrows, Commissioner of Department of Industrial Relations of the Commonwealth of Kentucky, given on cross-examination, indicates that Brown questioned Stickel's authority. However, Burrows' testimony also shows that Brown's questioning was not for the purpose of determining whether Stickel represented a majority but rather for the purpose of challenging Stickel's authority to represent any employees who did not select him as their representative regardless of whether a majority had selected him.

The precise sequence of the discussion at the conferences does not clearly appear. However, the proposed agreement was read through several times and each article thereof was discussed in some detail. Although no wage schedule was embodied in the agreement, the question of wages was mentioned. At some time Brown stated that the respondent was unable to pay higher wages and that it could give its employees more money only if it lengthened their hours of work from six to eight hours per day. The proposed agreement contained a provision limiting hours of work to six hours per day and 36 hours per week.

In the discussion, Brown raised objections to many provisions of the proposed contract. His objections, however, seem to have centered in large part upon two points. He objected to the heading which named the International Association of Oil Field, Gas Well and Refinery Workers of America as a party of the agreement and to the last article referred to as the "closed shop clause."⁹

⁹This provision reads: "The employer agrees that none but members of the International Association of Oil Field, Gas Well and Refinery Workers of America will be employed, except where no such men are available. Whenever necessary to employ non-members such employees shall become members of the above mentioned Association, within 15 days after date of employment. Failure of any new employee to become a member shall be cause for dismissal, and the employer hereby agrees to dismiss such employee within 15 days after date of employment."

The respondent and the Union disagreed as to whether to call this a closed-shop provision. The Union representatives contended that this was not a closed-shop provision in that it was applicable only to those hired by the respondent after the effective date of the agreement and not to those already in the employ of the respondent.

The respondent takes the position that an impasse was reached with respect to this clause which resulted in a failure to come to any agreement at the several conferences which were held between it and the representatives of the Union; that the respondent insisted on excluding the closed-shop clause and the Union was adamant on retaining it. The testimony indicates, however, that this and subsequent meetings were unsuccessful because of the respondent's opposition to dealing with the representatives of its employees. Stickel, on at least one occasion, asked Brown whether he would agree to the remainder of the contract if the closed-shop provision was eliminated. Brown replied by voicing his objection to the heading which named the Union as a party to the contract. When Stickel asked Brown whether he would suggest a substitute proposal for the closed-shop clause, Brown advanced none. Although Brown was bitterly opposed to signing a closed-shop agreement with the Union, he expressed his willingness to sign such an agreement with an independent union of his employees. He is quoted by Stickel as telling the committee that "if they organized themselves a nice little union, with bylaws that he could approve of, that he would be very glad to agree to such a union," and deduct its dues from the pay checks of his employees. He assured the committee that if they "had that sort of a union, he would see that every man in the plant belonged to it."

At the conference, Brown sought to justify his objection to the heading of the agreement which named the Union as a party on the grounds that the respondent's business was a local one; "that he was a Kentuckian; and that he did not see any reason for anybody from Washington coming here to meddle in his business at all." When Stickel, however, at this meeting and the one held with Brown on the following day, suggested that the contract be in the name of Local No. 211, Brown replied "that would not make any difference; it would still be a union, and it would not be the kind of a union that I think would be best for the boys."

Moreover, Brown objected to Stickel's presence and accused him of having secretly agitated his employees. He stated that if Stickel had not intervened, there would have been no dissatisfaction among his employees, that there was no need for an agreement, and that he understood his employees' need far better than Stickel did. In his own testimony, Brown admitted having expressed hostility to Stickel by contrasting Stickel's intelligence, tact, and education unfavorably with that of his employees.

The meeting adjourned approximately at 6 p. m. without any agreement having been reached. Brown consented, however, to meet with Stickel and the committee on the following day. This meeting started at about 2 p. m. At this time the Ohio River was rising, and the discussion was frequently interrupted as Brown gave

orders over the telephone in preparation for the flood. Brown complained that the committee members were "not in a friendly frame of mind," and repeated that "there was no need for any outside interference" by "foreigners" and that he desired to deal with Kentucky people. He notified the committee that in any event he was unable to sign any agreement with the Union at this time since Miles, whose presence he said was necessary, was away. After about two hours the committee left, not having achieved any agreement, but with the understanding that they would meet again with officers of the respondent after March 1, by which date Miles was expected to return.

On January 22 the refinery was closed due to a flood, and it remained closed until about February 5, when the flood receded. From that time until about February 15, the employees were engaged in cleaning up the plant in preparation for its reopening.

On February 15, 1937, Stickel returned to Louisville, having been informed by the Local that the plant was about to resume operations and that Miles had returned. He tried to reach Miles by telephone but was told that although Miles had returned he was not in the office at the time. The following morning, when Stickel telephoned again to the respondent's offices, he was referred to Brown. Brown refused to see Stickel, saying among other things, "Go on and plant yourself a garden, or go back to Washington and run the government; and after the 1st of March I will talk to you." On the following day, Stickel left Louisville without having succeeded in conferring with the respondent.

On February 17, 1937, which was the respondent's regular pay day, the employees were notified to go to the office to get their checks. As they waited outside they were called one by one into the office where each was met by Brown, Loudermill, and Waples. Gaskell, foreman of the Dubbs cracking department, and Miles, who appears to have returned to Louisville, were also in the office during some of the interviews. For a period of two or three days, Brown and the above-named officers of the respondent interviewed most of the men individually, informing them that the respondent was going to operate on a new schedule and that the employees were to work eight hours instead of the six hours per day which they had previously worked. He told them that in this way they would make more money than under the previous schedule and asked them if they were willing to work under these conditions. The evidence indicates that Brown spoke to some of the men about the Union, questioning them as to their union membership. He advised at least one of his employees not to go to a Union meeting which he told the employee he understood was to be held at about this time. Another employee testified that he was advised by Loudermill not to go to the Union meet-

ing. Under varying circumstances in connection with the change to an eight-hour day, approximately 20 men, members of the Union, were discharged on February 17, 1937; and the days immediately thereafter, and, as hereinafter found, most of these were discharged because of their membership in the Union.

On February 20, 1937, after having been informed of the discharges, Stickel returned to Louisville. At the request of the Local, Houston, a conciliator from the United States Department of Labor, and W. C. Burrows came to Louisville to attempt to effect some settlement between the respondent and the Union. On February 22, at a meeting of the Local, it was voted to call a strike in the event mediation and conciliation failed. On that same day, Houston and Burrows conferred with Brown and suggested that the committee of the Local and Brown meet in an effort to settle their differences. Brown is reported by Burrows to have replied that "he saw no reason for that, because the problem was solved; that everybody was happy; that it was true that 23 men were out of a job, but that they had not come to him in the right way, or in the right frame of mind; but he still was not mad at them, and he was going to try to get them jobs . . .; in fact, as far as he was concerned, it looked like it was all settled." However, Brown agreed to meet again with Stickel and the committee of the Local if the conciliators insisted on another meeting.

The meeting took place on February 24, 1937.¹⁰ At the outset, Brown manifested cordiality to all the participants, but very shortly thereafter he expressed to the group his inability to see any reason for the meeting. He reiterated his previous attacks against Stickel, stating that "he ought to get out of town, to leave town; that he had already settled his problem, and that they would not have any trouble, if he had not come into town." When urged to restore the six-hour schedule in the plant, Brown refused on the ground that the increase in hours enabled those employees working to earn more money. As reported by Stickel, Brown stated at the meeting to one of the conciliators, "The trouble is that these fellows have joined the union, and have gotten themselves into a pickle. They have lost their jobs, and they are whipped. Now, why don't they be sports, and admit it? If they will come back to me individually and tell me that they are sorry, and tell me that they are willing to work, and tell me that they are willing to drop their nefarious schemes and agitations, I will consider those that I want to put back to work. I don't need the men . . . I have plenty of men. All of my men are satisfied, and all of those who are not satisfied are not my men. They are

¹⁰ Present on behalf of the Union was Stickel and a committee consisting of Lockard, Johnson, and Kaehn, employees of the respondent who were among those discharged on or about February 17. Both conciliators were also present.

out." Burrows quotes Brown as stating at this meeting that "if his employees had come to him in the right sort of way, they would all be working today."

At the request of one of the conciliators, the proposed contract was again read at this meeting. The closed-shop clause and the heading of the contract both loomed large in the discussion at this conference as in the previous conferences. During this discussion, Brown expressed open hostility against Stickel and reiterated his refusal to negotiate with the International Union and his objection to the heading of the contract. There is some evidence that he again suggested that the employees form their own union at the company. Stickel suggested that he himself leave the negotiations and that another take his place. Brown, however, indicated that such a change would not alleviate the difficulty. When Stickel advised Brown that his men were taking a strike vote which, depending upon its outcome, might be proof of their dissatisfaction, Brown replied, "I would like to attend that meeting (a meeting of the Local to be held the following night). I would like to debate the matter with you, Mr. Stickel. I believe I can get these men to run you out of town." As a natural result of Brown's unconcealed hostility towards Stickel and the Union, the meeting became increasingly bitter, and finally ended fruitlessly.

During the remainder of the week, the two conciliators held a series of conferences with Brown on the one hand and the representatives of the Local on the other, in an effort to bring the parties together and to avoid the probability of a strike.¹¹ On February 27, 1937, Stickel met again with Brown, but this meeting like the others ended in failure.

On March 2, 1937, the strike was called, and the plant shut down. There is evidence indicating that in the period immediately prior to the strike Loudermill spoke to at least two employees expressing his desire that they not attend a union meeting. As the result of another conference between Brown and the conciliators after the strike began, Brown agreed to meet again with Stickel and representatives of the Local on March 6.¹² The conciliator and Brown conferred about four hours, and Stickel and his companions were present for approximately an hour and a half of that time.

At first it appeared that some progress might be made. Then, in the midst of the discussion, Brown attacked the Union for shutting

¹¹ In its brief, the respondent raises an objection to a ruling of the Trial Examiner which excluded from the record testimony of a telephone conversation and conferences between Brown and Philip G. Phillips, Regional Attorney of the National Labor Relations Board, with respect to a settlement of the dispute between the respondent and the Union. We find no prejudicial error in the ruling of the Trial Examiner, inasmuch as negotiations by Brown with intermediaries, such as the conciliators and Phillips, do not satisfy the respondent's obligation under the Act to bargain collectively with the representatives of its employees.

¹² Holz, president of the Local, and Lockard accompanied Stickel to this meeting

down his plant and for being lawless. Brown is quoted by Burrows as saying, "Now, you fellows have closed my plant down, and you have committed acts of violence. Now, what I think you ought to do is to call this committee of yours in, and let me run my own affairs. I am not going to do business with you at all." The union men stated that if any men had committed violence they would not be returned to work and suggested that if any disagreement arose as to whether a man had committed violence, the case should be submitted to arbitration. This Brown refused. The conference ended in failure, and no subsequent meetings between Brown and representatives of the Local were held.

Brown's assertions that he saw no reason for the negotiations, his gratuitous advice at the conferences that his employees did not have to deal with an "international union," but could form their own union, and similar statements, all betray his determination not to bargain with the chosen representatives of his employees.

Under the Act, it is the respondent's duty to bargain collectively with the representative selected by a majority of its employees for the purposes of collective bargaining. The respondent cannot legally refuse to negotiate with the Union because it prefers that another represent its employees. It cannot legally refuse to negotiate with the International Association selected by a majority of its employees to represent them because it prefers to deal with the Local of the Association. Its duty is to negotiate in good faith with whatever agent or agency a majority of its employees have selected. That is precisely what the respondent did not do at these meetings. On the contrary, Brown openly and repeatedly expressed his refusal to negotiate with the Union, and instead suggested the desirability of the employees forming a union of their own, unconnected with any outside organization. Brown's refusal to agree to the closed-shop provision with the Union contrasts significantly with his offer to the committee that such provision would be acceptable if included in an agreement with a union such as he suggested. Thus Brown revealed that his essential objection was directed not against the closed-shop clause but against negotiating with the designated representatives of his employees. His opposition to the closed-shop provision was nothing else than a pretext seized upon, together with objections to other parts of the agreement, for the purpose of preventing the successful outcome of the negotiations.

We must, moreover, take Brown's repeated statements that he saw no reason for the negotiations as expressing his refusal to bargain with Stickel and the committee. That Brown continued to discuss and that at times he may have come to apparent agreement on some of the provisions of the contract do not constitute bargaining in good faith. The obligation under the Act is to make a bona fide

attempt to come to terms and not merely to meet with employee representatives, however frequently, to discuss a proposed agreement without the intention of composing differences. The evidence as summarized indicates that Brown maintained the same attitude at all the conferences with Stickel. At all of them he attacked Stickel and the Union in the manner indicated, and the same conclusions must be reached with respect to each of the meetings.

We also turn to the respondent's answer for enlightenment, part of which reads as follows:

The respondent admits that it refused to bargain collectively with said Stickel and his associates, or with the said International Association, or with the said Local No. 211 as the exclusive representative of all of the men employed by the respondent in its manufacturing business but it did not refuse to bargain with them collectively as the exclusive representative of all of its employees who were members of said International Association, . . .

This admission clearly reveals a misconception by the respondent as to its obligation in dealing with the representatives of its employees.

Nor do we overlook Brown's refusal to confer with Stickel on February 16, 1937. The parties had agreed to postpone negotiations until March 1 because of the absence of Miles without whom, Brown asserted, he could not sign any agreement. Brown's rebuff of Stickel occurred at a time, however, when the respondent, according to Brown's testimony, had determined to go on the eight-hour schedule and only one day prior to the day upon which this change, resulting in the discharge of approximately one-fourth of the respondent's employees, was to take place. In view of Brown's decision to change the schedule, his rejection of Stickel's request to resume negotiations at a time when collective bargaining on the contemplated change would have been a matter of utmost moment to the employees was clearly an unjustified refusal to meet with the representative of his employees, regardless of the presence or absence of Miles and regardless of Stickel's ignorance of Brown's plans to change the schedule.

Upon the following day, the respondent, in discharging its employees as the result of the change to the eight-hour schedule, again violated its duty to bargain collectively with the Union. The question of hours of employment was already the subject of attempted discussion in the conferences between the respondent and the union representative. The respondent was under a duty to discuss the proposed change and the discharges with the Union in order to give its representatives an opportunity to offer substitute proposals and to suggest an equitable basis of making the discharges, if necessary.

Instead of this, the respondent, by its officers, first rejected Stickel's offer to bargain and then approached its men, not through the Union, which was requesting further negotiations, but individually, and apprised them of its will. We can think of no more direct method of destroying the possibility of collective bargaining than this complete disregard of the duly selected representatives of the employees. In the meetings which had taken place on January 21 and 22, it does not appear that the question of the eight-hour day was so fully explored as to warrant Brown in believing that further negotiations on this issue were futile. Although Stickel and the committee appear to have rejected the eight-hour proposal when suggested, they also stated at the conferences on January 21 and 22 that if an eight-hour day was to be installed, nevertheless, the principles upon which the resulting lay-offs would be made gave scope for collective bargaining.

Under all the circumstances of this case, the institution of the eight-hour schedule and the resultant discharges constitute interference with, coercion, and restraint of the respondent's employees in the exercise of the rights guaranteed by Section 7 of the Act and also a refusal to bargain collectively with the representatives of the respondent's employees.

It is suggested by the respondent that Brown's objections at the meetings were directed not against negotiating with the representatives of the employees or with the Union but against contracting with the Union; that although Brown was willing to negotiate with the Union the contract would have to be between the respondent and its employees. The evidence does not support this contention. As already indicated, Brown's remarks clearly reveal that during the meetings he stood upon no such technical grounds, but unequivocally and repeatedly evidenced his antipathy to dealing with the Union and with Stickel. In any event, however, the defense rests upon a misapprehension of the nature of the obligations imposed by the Act. The final attainment of an understanding and the signing of the contract embodying the fruits of this understanding are part and parcel of the process of collective bargaining. The contract or agreement is part of and the culmination of the successful negotiations, and not a segment separate from the negotiations which have preceded it. An employer cannot under the Act refuse to recognize the duly designated representative of his employees for the purposes of contracting any more than for the purposes of negotiation. He must accept his employees' representatives as such throughout the entire process of collective bargaining.

Nor do we find that the respondent is relieved of its obligation under the Act to bargain collectively because of the fact that the proposed contract presented by Stickel stated in its title that the

Union was acting only on behalf of such employees of the respondent as were members of the Union. Where, as in this case, the Union in fact has a majority at the time of the conferences, the employer must bargain collectively with the designated representatives even though the union does not ask for recognition, in writing, of its right to act as the exclusive representative of all employees in the appropriate unit.

It is clear that the respondent, through its officers, persistently refused to bargain with the Union as the exclusive representative of its employees. We find, therefore, that on January 21, 1937, and thereafter, the respondent refused to bargain collectively with the Union as the representative of its employees in respect to rates of pay, wages, hours of employment, and other conditions of employment.

B. *The discharges*

The respondent contends that the change from the six to the eight-hour day necessitated the lay-off of the employees named in the complaint, and that it was made with the approval of a majority of the employees, enabling those continued in the respondent's service to earn more money as pay for the additional time they worked. It further contends that many factors, such as the capabilities of the men for the particular jobs and their willingness to work the eight hours required by the new schedule, determined the selection of those to be retained.

We find, however, that the respondent in its selection of employees for dismissal was guided by its antiunion bias. The union affiliation and activity of those who were eliminated from the respondent's employ as a result of the change to the eight-hour day is the strongest evidence of the actual basis upon which the respondent made its selection. It is significant that the 20 men whose employment was terminated included the president, the vice president, and the secretary-treasurer of the local, a majority of those who served on the committee which met with Brown on January 21 and 22, and a majority of the charter members of the Local. Nor does it appear that any except members of the Local were discharged at this time, although only 56 of the 85 employees of the respondent were members thereof. It must be concluded that the activity in and membership of these employees in the Local was a definite factor in determining that they should be dismissed from the respondent's employ. Moreover, a scrutiny of the employment records of those dismissed and of the circumstances attendant upon their dismissal in many instances gives additional proof that the respondent was guided by its hostility toward the Union in selecting employees for dismissal.

1. Employees in the Dubbs cracking department

Of the 20 men who were discharged, 10 held positions in the Dubbs cracking department. Gaskell, foreman of the department, referring to the discharges, testified that his department was "the hardest hit by the whole thing." Upon being further questioned, he stated that most of the union men were in his department and that he had been informed it was among his men that the Union had started.

Prior to February 17, 1937, 18 men were employed in the department, holding the following positions: Four Dubbs operators, one shift breaking operator, four firemen, one shift breaking fireman, four third men, three clean-out men, and one loader. Since the change to the eight-hour schedule only seven men have been employed to do the work previously performed by 18.¹³

Gaskell testified that all alike were satisfactory employees and there is no claim that any of these men were inefficient. Gaskell also stated that to his knowledge there had been no change in the method of operating the plant after February 17, 1937.

L. R. Lockard. Among the regular operators, Lockard alone was discharged. He had been employed by the respondent for approximately nine years. At the time of his discharge, he was earning 83 cents per hour. Significant is Gaskell's testimony that in his absence, Lockard took his place and performed the duties of acting foreman.

Lockard was among the first to join the Local and his name appears on its charter. On December 18, 1936, when the charter was installed, he was elected secretary-treasurer of the Local. He also served on the committee which on January 21 and 22 met with Brown to discuss the proposed agreement.

On February 17, Gaskell told Lockard that there would probably be no work until some 10 days had elapsed. In the afternoon Lockard returned for his pay check. Unlike other men he did not have to go into the office but received his check outside from Gaskell. When Lockard asked Gaskell about returning to work, Gaskell replied that it would probably be 10 days before the plant would operate again. That evening Lockard heard that some of the men had been discharged. When on the following day, February 18, he returned to the plant, Gaskell sent him into the office to see Brown. Brown told Lockard that the plant was going to operate on an eight-hour schedule and that his services were no longer required. When Lockard asked whether he was fired, Brown replied, "You are

¹³ Included among the seven was one new man, Ray Maniere, hired as a fireman since February 17. It does not appear whether he was hired before or after the strike of the respondent's employees which began on March 2, 1937. Another man, George Mims, was transferred after the commencement of the strike from the welding department to the position of fireman under Gaskell.

not fired. You are just laid off indefinitely." When pressed for an explanation, Brown stated that he had no complaint with Lockard's work but that since Lockard had been dissatisfied, he should look for other employment. He then asked if Lockard would care to work on an eight-hour shift. Lockard answered that if the other men did, he likewise would have to work eight hours. Brown replied, "You see what the union does for you. You cannot even speak for yourself as an individual. You have to rely on the decision of other men."

Two of the three operators who continued to work, Troutman and Wilson, appear to have been union men.¹⁴ Wilson testified at the hearing that he no longer considered himself a member of the Local. The third operator, Kearns, did not belong to the Local.

In view of Lockard's long service with the respondent, his position as acting foreman in Gaskell's absence and the statements made by Brown, it is difficult to explain his discharge upon any basis other than his membership in the Union.

Hubert Rankins. Rankins had been in the respondent's service for approximately four years and at the time of his discharge was employed as a shift breaking operator at an hourly rate of 75 cents. He had been advanced about three times by the respondent and received a raise in salary in the middle of 1936. Rankins was a charter member of the Local and had participated in the meetings with Brown on January 21 and 22.

On February 17, 1937, Rankins received his check from another employee, David Allman, to whom Gaskell had given the check. Having heard that some of the men were discharged, Rankins returned to the plant on the following day. He asked Loudermill if he was among those who were discharged. Loudermill told him that he had been laid off because of the shift to the eight-hour schedule. When Rankins replied that he did not understand why he was laid off, Loudermill answered, "Oh, yes, you do." . . . "You have got the wrong attitude toward things. I am sorry for you, but Mr. Brown just can't use you." Rankins was told that he could have a recommendation. A few days later when he returned to get the recommendation, he was sent into Brown's office. Brown asked him whether he "was willing to drop all of this mess," and expressed his opinion that Rankins, after he received the recommendation, would use it against him. He then advised Rankins to go home and "cool off." Rankins left without receiving the recommendation.

Paul Grant and Jesse Johnson. Of the four regular firemen employed by the respondent, Paul Grant and Jesse Johnson were dis-

¹⁴ Both Wilson and Troutman have also been in the respondent's service for about nine years. The length of service of the other operator, Kearns, does not appear.

charged. Grant had worked four years and Johnson three and one-half years for the respondent.

Johnson had been promoted and received a wage increase some eight or nine months prior to the hearing. Both men were earning 60 cents per hour at the time of their discharge. Both were charter members of the Local and Johnson had served on the committee which had met with Brown.

Of the two firemen who were not discharged, one, George Burns, was a member of the Local and had been in the respondent's employ for approximately eight or nine years. The other, Earl Brooks, was not a Union member. The shift-breaking or extra fireman, Laurence Davis, was also not dismissed. Davis was a charter member of the Local, but according to his own testimony had never participated in any union activity or attended the meetings of the Local. At the time of the hearing, he worked as a regular fireman.

On February 17, 1937, Grant came to the plant to obtain his check. Upon telling Gaskell that he would have to go home, he was paid by Gaskell and told to return in a few days for the purpose of finding out when he should go to work. On the following day, Grant returned to the plant and asked Gaskell whether he was among those discharged. Gaskell replied, "No, we are not calling them fired; we are just laying them off, but we are not going to call them back." Gaskell then ordered Grant to take his clothes from the locker. When Grant returned with his clothes, he met Loudermill who expressed his regret at what had happened and said that Mr. Brown had told the union organizer that he would shut his plant down and let it rust before he would recognize the Union. Loudermill then told Grant that he could go and see Brown. Grant, however, never went.

In a brief submitted by counsel for the respondent, it is argued that Grant was never discharged. The words of Gaskell, however, clearly constitute notice of dismissal. Loudermill plainly recognized that Grant's dismissal had been determined and his subsequent remark that Grant could see Brown was, at most, a suggestion that Grant might importune Brown to rehire him. It cannot be construed as an offer to rehire him. A discharged employee does not lose his rights under the Act by not applying for the position from which he has just been dismissed.

On February 17, 1937, Johnson, likewise, received his check from Gaskell outside of the office. Gaskell informed him that it would probably be 10 days before work would be resumed at the plant. A day or two later, Johnson went to the tube still of the respondent's refinery, where he saw Gaskell and Loudermill. When Johnson asked Gaskell how he would start when the plant began to operate, Gaskell

replied that he did not know and that "he didn't have enough men left to light a fire. When Johnson asked Loudermill if he was discharged, Loudermill replied, "Well, we will just not need you any more." He then told Johnson to take from the plant any clothes he might have left there.

The antiunion bias of the respondent in discharging Grant and Johnson is manifested by the significant facts, already mentioned, that only Union members appear to have been singled out for dismissal and that among those dismissed were included almost all the Union officers.

George Lang, Ed Morgan, and David Allman. Lang, Morgan and Allman were "third men." The duties of the "third men" included carrying samples, filling lubricators, cleaning up, and watching the tanks. It was contended by the respondent that even if the six-hour schedule had been maintained, it would have been necessary to discharge the "third men" employed in the Dubbs cracking department because their services were not necessary after February 17. Gaskell explained this by stating that the still in the department was part of a unit which the respondent had just built, and the "third men" were employed "so that the operators and the firemen could have more time to study it out."¹⁵ Gaskell also stated that no "third men" were being employed by the respondent at the time of the hearing.

Although we accept as true the respondent's contention that it no longer needed the "third men," it is significant that the respondent found that it might dispense with their services at the very time when, in accordance with the requirements of the newly adopted schedule, it was selecting employees for dismissal and including among those thus selected the most important officers of the Local and a majority of the members of the Local's committee. Under these circumstances, it is difficult to believe that they were discharged because no longer needed rather than because of the respondent's desire to strike at the members of the Local in the Dubbs cracking department, where it was strongly entrenched and where it included almost all the employees among its members.

Three of the four "third men" were discharged. It does not appear what the duties of the fourth were after February 17, 1937. On that day, both Lang and Morgan received their checks outside of the office from Gaskell. When Morgan returned to the plant on the following day, Gaskell ordered him to take his clothes away and stated that the respondent was laying off the "third men." Lang returned about a week after he received his check and was told by Loudermill that it had been decided to lay off the "third men."

¹⁵ Gaskell spoke of still helpers in this part of his testimony. From the context, it appears that by still helpers he meant "third men"

Lang had been in the respondent's service about one year and one month. Both Lang and Morgan received an hourly rate of 45 cents. Both were members of the Union.

David Allman had been in the respondent's employ for approximately four years and at the time of his discharge was working as a "third man" at an hourly rate of 50 cents. He was a member of the Local and one of those who had originally applied for a charter.

On February 15, 1937, he was sent home by Gaskell and told to return the following day to obtain his check. On February 17, he was sent into Brown's office to receive his check. When Brown told him of the proposed eight-hour schedule, Allman asked whether this would not result in a lay-off of some of the men. Brown replied it would and then stated that Gaskell had decided to employ Allman as a fireman at what would be an increased wage. Allman answered that he had joined the Union and "wanted to stick with them and do whatever the rest of them did." When Brown pointed out that his salary as fireman was good for a man of Allman's age, Allman reiterated his loyalty to the Union. Brown told him "Good day," and Allman left. The following day he met Gaskell who told him to take his clothes from the locker.

Allman's reply to Brown that he had joined the Union and "wanted to stick with them" must be viewed in the context of the Union's efforts to bargain with the respondent on working conditions, including the question of hours. We have already found that the institution by the respondent of the eight-hour schedule was an anti-union act designed to interfere with the self-organization of the respondent's employees and with collective bargaining. Allman's words must be interpreted as signifying his refusal to accept Brown's method of approaching the men individually and his objection to Brown's complete disregard of the Union in instituting the change in schedule and in making the dismissals.

C. P. Hunt and A. Woodliff. Gaskell testified that Hunt and Woodliff were both employed as clean-out men. Hunt, however, described his job as that of a car loader helper. Both men received an hourly rate of 45 cents. Hunt had been employed by the respondent for three years prior to his discharge. Both Hunt and Woodliff were members of the Local, and Hunt had the distinction of being a charter member. On February 18, 1937, he was called into the office and informed by Brown that the respondent planned to shift to the eight-hour schedule. To Hunt's reply that he thought that "six hours is enough for any man to work," Brown stated, "If that is the way you feel about it, I don't think you will have any trouble in finding another job." Woodliff's experience was similar. When informed by Brown of the proposed shift, he answered that he could

not work on an eight-hour schedule. Brown replied, "That is all I wanted to know," and Woodliff left. As in the case of Allman, it is clear from the context of the record that the replies of Hunt and Woodliff are to be interpreted, not as voluntary relinquishments of employment, but as refusals to accept Brown's technique of announcing the shift to the eight-hour schedule individually to the men instead of bargaining collectively with the Union. Under the circumstances we construe the action of Brown in bringing about their separation from employment in this manner as a discharge.

One of the clean-out men was not discharged. It does not appear what his duties have been since February 17, 1937. Significant is Gaskell's reply at the hearing when questioned whether he was handicapped without the clean-out men: "Since I don't have them, I just have to get along without them." He likewise testified that the clean-out men performed a necessary operation and that they were steadily occupied with their duties while at work.

*G. V. Sandefur.*¹⁶ Sandefur was employed as a loader in the Dubbs cracking department and had been an employee of the respondent for approximately five years. He was a charter member of the Local and on January 22, 1937, served as a substitute for another member on the negotiating committee which met with Brown.

On February 17, 1937, Sandefur sent his brother to get his pay check for him. His brother returned unable to obtain the check. When Sandefur arrived at the plant, he was called into the office and there heard of the shift to the eight-hour schedule. He asked Brown if this would result in the lay-off of some of the men and then stated that he needed some time to decide what answer he should give Brown. Miles, who was present, told Sandefur that the respondent wanted him to continue working with it and that if, after consideration of the matter, he was willing to work eight hours, he should report to Gaskell or Loudermill.

Three days later he reported to Gaskell that he was ready to accept the offer. Sandefur was sent in to Brown. Brown told him that he understood Stickel was in town and asked what Sandefur would do if Stickel should call the men out on strike. Sandefur answered that he would walk out. Brown then told him that the respondent could not use Sandefur until he changed his mind.

The discrimination by an employer against those who express their intention of striking, if called upon, is a rebuke to concerted activity by members of a labor organization. We find that Brown, by discharging G. V. Sandefur because of his expressed intention of par-

¹⁶ In the complaint, the names G. V. Sandufer and Joe Sandufer are given. However, in the record and on the application cards the names appear as G. V. Sandefur and Joe Sandefur.

ticipating in such concerted activity, if called upon by the representative of the Local, discriminated against G. V. Sandefur in regard to tenure of employment because of his union activity.

2. Men in other departments

W. F. Holz. Holz had been in the respondent's service for about three and one-half years. At the time of his discharge, he was earning 60 cents per hour. He was the president of the Local and a charter member.

On February 15, 1937, when Holz returned from the refinery to his home, he found a telegram signed by The Louisville Refining Company which read: "Don't report for work until further notice."¹⁷ The respondent contends that A. R. Green, chief chemist of the respondent, who sent the telegram, had no authority to do so. We do not, however, need to rely upon the telegram in determining whether Holz was discharged for his union activity. On February 17, 1937, Holz returned to the refinery. He was directed into Brown's office to receive his check. Brown informed him of the proposed change in schedule and stated that Holz was laid off inasmuch as the respondent did not require as many men on the eight-hour schedule. When asked for a recommendation, Brown replied, "I will give you a recommendation telling just exactly what you are." Upon being pressed to explain what he meant, Brown stated, "Well, of course I would not recommend you to an innocent company, and have you stir up a lot of trouble for them." He agreed, however, to give Holz a recommendation to a union shop. Then Loudermill and Holz continued the discussion outside of the office. When Holz asked whether he should return for the recommendation, Loudermill replied that Holz should not return and that he should take his clothes with him. Holz then stated that this seemed to indicate that he was discharged and Loudermill agreed that this was the case. Holz then left after being told by Brown that he would receive a recommendation.

*Philip Kaelin, Joe Sandefur,*¹⁸ *W. L. Howlett,* and *Charles Harrison.* Kaelin had been employed by the respondent for almost nine years. At the time of his discharge he worked as a gasoline treater at an hourly rate of seventy-three cents. He had been elected vice president of the Local. On February 17, 1937, Griffith told Kaelin that he could go home.¹⁹ After some days, Kaelin heard that his name was on a list kept by the gasoline attendant as one of those

¹⁷ See Bd. Exh. No. 19.

¹⁸ See Footnote No. 16, p. 867.

¹⁹ At this time the plant was not operating because no power was available. A number of the men appear to have been told to go home pending the resumption of operations.

to whom no more gasoline could be sold.²⁰ On either February 22 or 23, he called Loudermill, who informed him that he was laid off. He was also told that the respondent would notify him if his services were needed. He has never been notified to return.

At the time of his discharge, Joe Sandefur, who is a brother of G. V. Sandefur, was employed as a laboratory assistant at an hourly rate of 48 cents. He had entered the respondent's employ on or about December 8, 1935. Since then he had been promoted from the "gang" on which he worked to his present position in the laboratory. Like his brother, he was a member of the Local. On February 17, 1937, he received his check from Gaskell outside of the office. On the following day, Joe Sandefur returned with his brother and while waiting for him to obtain his check, was called into the office by Gaskell. There Brown informed him that the respondent was shifting to the eight-hour day and that his services were no longer required. Sandefur asked whether this meant that he was "out of the laboratory and back to the gang." Brown replied that he should look for another job since the respondent did not need him any longer.

Howlett was employed as a still fireman at an hourly rate of 53 cents. After the flood, however, he worked at the same wage as a night watchman until February 18, 1937. He had been four years in the respondent's employ. His name appears upon the charter of the Local. On the night of February 18, the watchman whom Howlett relieved told him to wait until 8 a. m. on the following day inasmuch as Loudermill wished to see him. Howlett waited and was given his check by Loudermill who told him that his services were no longer required since they were going on the eight-hour schedule. He was then ordered to take his clothes from the locker.

Charles Harrison had been employed for six years by the respondent. At the time of his discharge, he worked as a laboratory and relief assistant on the stills. His hourly rate of pay was sixty cents. He also was a member of the Local. On February 16, 1937, Estes, foreman of the still, sent Harrison home after he had worked four hours, telling him to return when the power was again turned on. The following day, the clerk in the office brought out his check and gave it to him. Approximately three days later, Harrison returned to the plant to find out if he should resume work. Loudermill informed him that his services were no longer needed inasmuch as the respondent was going to operate on an eight-hour schedule, and ordered him to take his clothes from the locker. Harrison testified

²⁰ The respondent sold gasoline to its employees on credit and then subsequently deducted the price of the gasoline from the wages of its employees at the end of a pay period.

that he had worked longer in the plant than any of the four men who still remained doing work of the kind which he had performed. This was not refuted.

As in the cases of all those discharged, the fact that only Union men appear to have been selected for dismissal, although a substantial number of the respondent's employees never joined the Union, disclose that the respondent was motivated in discharging these four employees by its hostility to the Union.

J. W. Linzay. Linzay had been employed by the respondent for about eight years with the exception of two periods of four or five months and approximately one year, respectively. He worked as a machinists' helper doing maintenance work in the machine shop and some work on the barges. Linzay was a member of the Local and participated in the meetings with Brown on January 21 and 22.

On February 17, 1937, Griffith, Linzay's foreman, notified him, after he had worked for one hour, that Loudermill had ordered everyone to be sent home except those working on some motors in the boiler room. Although Linzay was working on these motors, Griffith nevertheless sent him home. Linzay asked Griffith how he would know when to return to work and whether the respondent was laying off the men. According to Linzay's testimony, Griffith grinned and replied that he did not know.

About 3 or 4 p. m., Linzay returned to obtain his check. He was not among those called to be interviewed by Brown, but he received his check from Gaskell outside of the office. Nothing appears to have been said at the time about his returning to work. Approximately two or three days later when he went by the refinery, the gates were locked. At this time two members of the Union told him that they had seen his name on the "list."²¹

Linzay reasonably assumed that his services were no longer wanted from the fact that he was sent home, although one of a class (working on the motors in the boiler room) which, according to Griffith, was exempt from the order to go home, and further from Griffith's apparently evasive response to Linzay's questions with respect to resuming work and possible lay-offs.

Hubert Burns. Burns had been working for the respondent for somewhat more than a year. Until his employment with the respondent was terminated, he worked as a laborer receiving an hourly rate of 45 cents. On January 18, 1937, he signed his application card for membership in the Union.

²¹ It is not clear to which list this testimony refers. The evidence indicates the existence of at least two lists, one held by the respondent's gasoline attendant containing the names of those to whom gasoline might no longer be sold and another in the possession of the watchman at the gate of the refinery containing names of those excluded from the plant.

On February 17, 1937, he came to the plant to receive his pay check. It appears, however, that his brother,²² also an employee of the respondent, obtained Hubert Burns' check from Gaskell. When the brother inquired whether Hubert Burns should return to work, Gaskell told him that it would be necessary to see Loudermill. After an absence of three or four days, during which Hubert Burns heard that the plant was not operating for lack of electrical power, he returned one morning at 7:30 a. m., a time at which he had customarily arrived to report for the 8 a. m. shift while working for the respondent. Finding the gate locked, he blew the horn of his car and since no one answered, he backed out and returned home. According to his own testimony, he did not wait around but left when no one opened the gates. It also appears that his brother informed him that the union men were being discharged and advised him that there was no need for him to return to the refinery.

While his case is not free from doubt, the evidence does not substantiate a finding that Hubert Burns was discharged by the respondent.

Michael Feeney. Feeney had been employed by the respondent for a year and a half. At the time of his discharge, he worked in the welding department receiving a daily wage of \$2.70 for six hours' work. His application card shows that he joined the Union on January 4, 1937.

As a result of his work during the flood, Feeney had injured his foot and found it necessary to stay away from the plant. His family being away because of the flood, he stayed at his mother's house while his foot was healing. Subsequently, he learned that his house had been damaged by the flood and about February 15, he telephoned Hanley, a superintendent of the respondent, to ask if he might have another week's leave to clean his own house and prepare it for the return of his family. Hanley replied that he "wanted nothing to do with" Feeney, and told him to call Loudermill. When called, Loudermill told Feeney to come to the plant to see him. At some time thereafter, probably on about February 16, 1937, Feeney went to the plant and found the gates locked. He asked the watchman²³ on duty whether he might see Loudermill and was told that Loudermill was in the plant with Brown. The watchman refused to let Feeney into the plant and told him that he was on the "black list." When Feeney explained that Loudermill had told him to come to the refinery for the purpose of seeing him, the watchman replied that Feeney could not enter. At some subsequent time, Feeney appears

²² This brother would appear to be George Burns, who was not discharged during this period but continued to work until the strike occurring on March 2, 1937.

²³ Feeney identified the watchman as a man named Monroe, although he was not certain of this.

to have made an effort to reach Brown by telephone but being told that Brown was somewhere in the plant, he was not able to speak with him.

One of the normal functions of a watchman is to bar undesirables from his employer's premises, and it was, therefore, reasonable for Feeney to believe that the watchman was acting with the respondent's authority in refusing him admittance. The respondent is bound by those acts of its agents which reasonably appear to be within the scope of their authority. The natural interpretation of the watchman's refusal to admit Feeney is that Feeney had been dismissed from his employment.

As in the case of the other discharged employees, we are persuaded that the respondent was guided by antiunion bias in discharging Feeney by the significant fact that only union men appear to have suffered loss of employment as a result of the lay-offs.

M. Clagett. Clagett did not testify at the hearing because he was ill. However, counsel for the Company orally stipulated at the hearing that Clagett's testimony would be the same as that of Woodliff. We, therefore, find that Clagett was discharged because of his union affiliation.

Robert Fuller. At the time of his discharge, Fuller was employed as a gauger²⁴ receiving an hourly rate of 60 cents. He had worked nine years for the respondent. His application card for membership in the Union was dated December 4, 1936.

On February 17, 1937, the treater foreman, Bryner, approached Fuller, and asked him to sign a paper directed "against the union," and added that a refusal would cost him his job. Fuller replied that he would consider it. Subsequently, Loudermill told Fuller that inasmuch as he had worked hard during the flood, he should take a few days off. Observing a line of men waiting for their checks, he left. The following day, men were still waiting to obtain their checks. Finally, Gaskell called Fuller into the office. Brown there asked him if he was willing "to stick with the company, and work eight hours." Fuller answered that he had joined the Union. Brown then asked if Fuller "would be willing to drop that mess, and stick with the company." Fuller expressed his willingness to work eight hours and answered, "I would stick with the company, but I couldn't afford to drop my union." Brown then told him that the respondent could not employ him, and Loudermill expressed his regret that Fuller did not "stick with the company."

We find that at the time of the hearing, L. R. Lockard, Hubert Rankins, Paul Grant, Jesse Johnson, George Lang, Ed Morgan, David Allman, C. P. Hunt, A. Woodliff, G. V. Sandefur, W. F.

²⁴ The duties of a gauger are to gauge the amount of oil in the various tanks.

Holz, Philip Kaelin, Joe Sandefur, W. L. Howlett, Charles Harrison, J. W. Linzay, Michael Feeney, M. Clagett, and Robert Fuller had not obtained any other regular and substantially equivalent employment.

We find that by discharging the afore-mentioned men on or about February 17, 1937, the respondent has discriminated against its employees with respect to hire and tenure of employment and thereby discouraged membership in a labor organization, and that by such acts the respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act. Their work having ceased as the result of unfair labor practices, the afore-mentioned men have at all times thereafter retained their status as employees of the respondent, within the meaning of Section 2 (3) of the Act.

The evidence concerning Hubert Burns does not establish that he was discharged or discriminated against in regard to hire and tenure of employment. The complaint with respect to him will therefore be dismissed.

C. The strike

As already indicated, on March 2, 1937, the respondent's employees struck as the result of the respondent's refusal to bargain collectively and its refusal to reinstate the employees discriminatorily discharged. The evidence clearly shows that the strike was conducted in orderly fashion and without any violence.²⁵ The respondent contends, however, that some of the striking employees trespassed on the respondent's property at the beginning of the strike for the purpose of closing down the plant, and that the men who committed the trespass should therefore not be reinstated.

It is claimed by the Union that inasmuch as it is dangerous to leave fires burning in an oil refinery when the employees are no longer working, members of the Local were instructed by Stickel to shut the plant down with great care so that no damage would be done to the plant. It was voted by the members of the Local that pending a possible settlement of the dispute with the respondent, the strike would begin at 9 p. m. on March 2, 1937.

In the Dubbs cracking unit, Gaskell at about 6 p. m. on that day, apparently aware of the possibility of a strike, warned Burns, the fireman then on duty, that it would be a criminal offense to shut the still down. At 9 p. m. Gaskell took over the still. Shortly after 9 p. m. some employees who were outside the plant saw that the

²⁵ An injunction was issued during the course of the strike. Its provisions do not appear in the record, but the evidence indicates that no violations of the injunction occurred.

fires were still burning. The gates of the refinery were locked at the time. Dowell, a member of the Union, testified that he jumped over the fence and went to the Dubbs cracking unit to tell whoever might be there to shut down the fires because it was dangerous to keep them burning when the men were no longer watching them. He spoke to Burns and then to Gaskell. At first Gaskell refused to order that the fire be shut down. When two other strikers came and insisted that the fire be put out, Gaskell gave the necessary orders to Burns. Dowell and other members of the Union testified that this operation was performed with care so that no damage might result. No evidence was adduced to rebut this and Brown himself testified on cross-examination that there had been no damage to the property. Dowell and the other men also visited the tube still and the boiler room. Although Brown in his testimony alleged that members of the Union had threatened operators with violence if they did not shut down the plant, no concrete evidence was advanced to substantiate this allegation. Those striking employees who entered the plant, at worst, committed a technical trespass. We do not find in the trespass committed by some of the striking employees a sufficient reason to deny reinstatement to those committing the trespass.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

VI. THE REMEDY

We have found that 19 of the respondent's employees were discharged because of their union affiliation and activities. Therefore, in addition to an order requiring the respondent to cease and desist from its unfair labor practices, we shall also order the respondent to offer reinstatement to these men. We have also found that the respondent's employees struck on or about March 2, 1937, as a result of the respondent's refusal to bargain collectively with the Union, and the discriminatory discharges of members of the Union. Since the strike was caused by the respondent's unfair labor practices, the respondent is under a duty to restore the status quo which existed prior to the commission of the unlawful acts. The respondent must, therefore, upon application, offer to its employees who went on strike on or about March 2, 1937, reinstatement to their former positions, without prejudice to their seniority and other rights or privileges.

If after bargaining with the Union in good faith upon its request and after dismissing employees hired since February 15, 1937, the respondent determines that the services of any of its staff as then constituted are not required, it may reduce its staff, provided that it does so without discrimination against any employees because of their union affiliation or activities, following a system of seniority to such extent as has heretofore been applied in the conduct of the respondent's business, subject to any modification introduced by agreement with the Union.

Each of the discharged employees except M. Clagett is also entitled, for any loss of pay suffered by reason of his discharge, to a sum equal to the amount which he would normally have earned as wages from the date when he was discharged to the date of the offer of employment, less any amounts he may have earned in the meantime. Inasmuch as the Trial Examiner recommended the dismissal of the complaint as to M. Clagett, the respondent shall not be required to pay back pay from May 17, 1937, when it received the Intermediate Report to the date of this decision.

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

CONCLUSIONS OF LAW

1. International Association of Oil Field, Gas Well, and Refinery Workers of America is a labor organization, within the meaning of Section 2 (5) of the Act.

2. The strike of the employees commencing March 2, 1937, is a labor dispute within the meaning of Section 3 (9) of the Act.

3. The respondent, by discriminating in regard to the hire and tenure of employment of L. R. Lockard, Hubert Rankins, Paul Grant, Jesse Johnson, George Lang, Ed Morgan, David Allman, C. P. Hunt, A. Woodliff, G. V. Sandefur, W. F. Holz, Philip Kaelin, Joe Sandefur, W. L. Howlett, Charles Harrison, J. W. Linzay, Michael Feeney, M. Clagett, and Robert Fuller, and each of them, and thereby discouraging membership in a labor organization, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

4. All the refinery employees of the respondent in its refinery in Louisville, Kentucky, except supervisory employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

5. By virtue of Section 9 (a) of the Act, International Association of Oil Field, Gas Well, and Refinery Workers of America was on January 18, 1937, and at all times thereafter has been, the exclusive representative of all the employees in such unit for the purposes of collective bargaining.

6. The respondent, by refusing to bargain collectively with the exclusive representative of the employees in such unit on January 21, 1937, and thereafter, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

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

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

9. The respondent has not engaged in unfair labor practices, within the meaning of Section 8 (3) of the Act, with respect to Hubert Burns.

ORDER

Under 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 Louisville Refining Company and its officers, agents, successors, and assigns shall:

1. Cease and desist from interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act;

2. Cease and desist from refusing to bargain collectively with International Association of Oil Field, Gas Well, and Refinery Workers of America as the exclusive representative of all its refinery employees, excepting supervisory employees;

3. Cease and desist from discouraging membership in International Association of Oil Field, Gas Well, and Refinery Workers of America or any other labor organization of its employees, by discharging and refusing to reinstate employees, or otherwise discriminating in regard to hire and tenure of employment or any term or condition of employment, or by threats of such discrimination;

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

(a) Offer to L. R. Lockard, Hubert Rankins, Paul Grant, Jesse Johnson, George Lang, Ed Morgan, David Allman, C. P. Hunt, A. Woodliff, G. V. Sandefur, W. F. Holz, Philip Kaelin, Joe Sandefur, W. L. Howlett, Charles Harrison, J. W. Linzay, Michael Feeney, M. Clagett and Robert Fuller immediate and full reinstatement,

respectively, to their former positions without prejudice to their seniority or other rights and privileges;

(b) Make whole the employees named in paragraph (a) above for any loss of pay they have suffered by reason of the respondent's discrimination in regard to their hire and tenure of employment, by payment to them, respectively, of a sum of money equal to that which each of them, respectively, would normally have earned as wages during the period from the date of such discrimination to the date of the offer of reinstatement, pursuant to this order, less any amount earned by each of them, respectively, during such period; except that M. Claggett shall not be compensated for the period from May 17, 1937 to the date of this decision;

(c) Upon application, offer to those employees who went on strike on or about March 2, 1937, immediate and full reinstatement to their former positions, without prejudice to their seniority or other rights or privileges, dismissing, if necessary, all persons hired since March 2, 1937, to perform the work of such employees;

(d) Make whole all employees who went on strike on or about March 2, 1937, for any losses they may suffer by reason of any refusal of their application for reinstatement in accordance with paragraph 4 (c) herein, by payment to each of them, respectively, of a sum equal to that which each of them would normally have earned as wages during the period from the date of any such refusal of their application to the date of offer of reinstatement, less the amount, if any, which each, respectively, earned during said period;

(e) Upon request, bargain collectively with International Association of Oil Field, Gas Well, and Refinery Workers of America as the exclusive representative of all its refinery employees in Louisville, Kentucky, excepting supervisory employees, for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment;

(f) Post immediately notices to its employees in conspicuous places in its refinery in Louisville, Kentucky, stating: (1) that the respondent will cease and desist in the manner aforesaid; and (2) that said notices will remain posted for at least thirty (30) consecutive days from the date of posting;

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

And it is further ordered that the complaint be, and is hereby, dismissed in so far as it alleges that the respondent has engaged in unfair labor practices within the meaning of Section 8 (3) of the Act, with respect to Hubert Burns.