

IN THE MATTER OF HOPWOOD RETINNING COMPANY, INC. AND MONARCH
RETINNING COMPANY, INC. and METAL POLISHERS, BUFFERS, PLATERS
AND HELPERS INTERNATIONAL UNION LOCAL NO. 8, and TEAMSTERS
UNION, LOCAL NO. 584

Case No. C-237.—Decided January 15, 1938

Retinuing Industry—Interference, Restraint, or Coercion: ceasing operations at plant and organizing another company in new location; propaganda against union; soliciting employees to return to work by signing "yellow dog" contract—*Discrimination:* lock-out—*Units Appropriate for Collective Bargaining:* production employees; truck drivers and helpers—*Representatives:* proof of choice; applications for membership in union—*Collective Bargaining:* refusal to negotiate regarding an agreement with union; attempt to bargain with employees individually and to destroy union's majority—*Reinstatement Ordered:* employees locked out—*Back Pay:* awarded—"Yellow Dog" Contract: discontinuance ordered.

Mr. O. H. Walburn and *Mr. David A. Moscovitz*, for the Board.

Mr. Daniel J. Byrne, of Ridgewood, N. Y., for the Hopwood Retinuing Company, Inc.

Kotzen, Mann & Siegel, by *Mr. Abraham Mann*, and *Mr. Herman Goldman* and *Mr. Harry G. Liese*, all of New York City, for the Monarch Retinuing Company, Inc.

Mr. Jerome Y. Sturm, for the Metal Polishers and the Teamsters Unions.

Mr. Robert Burstein, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges duly filed by Metal Polishers, Buffers, Platers and Helpers International Union, Local No. 8, herein called the Metal Polishers Union, and Milk Drivers Local No. 584, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers,¹ herein called the Teamsters Union, the National Labor Relations Board, herein called the Board, by Elinore Morehouse Herrick, Regional Director for the Second Region (New York City), issued and

¹ Referred to in the caption of the charge and complaint as Teamsters Union, Local No. 584.

duly served its complaint, dated May 24, 1937, against Hopwood Retinning Company, Inc., Brooklyn, New York, herein called the Hopwood Company, alleging 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 National Labor Relations Act, 49 Stat. 449, herein called the Act. The complaint alleges in substance that the Hopwood Company, on March 31, 1937, discharged and locked out all of its employees, excluding supervisory and clerical employees, because said employees engaged in concerted activities for the purpose of collective bargaining, and has at all times since that date refused to reinstate them; that the Hopwood Company on March 31, 1937, and at all times thereafter has refused to bargain collectively with the Metal Polishers Union and the Teamsters Union, the exclusive representatives of the employees in respective appropriate units, with respect to rates of pay, wages, hours of employment, and other conditions of employment; and that the Hopwood Company, since March 31, 1937, has attempted to persuade the locked-out employees to withdraw from union membership, and has interfered with and coerced the employees in the exercise of their rights guaranteed in Section 7 of the Act.

The Hopwood Company filed an answer to the complaint admitting that up until March 31, 1937, it had been engaged in the reconditioning of milk and ice cream containers, as alleged in the complaint, but denying that it had been so engaged since that date. The answer further denied that the Hopwood Company had engaged in the alleged unfair labor practices and that said practices have any bearing or relationship to interstate commerce. The answer also requested that the charges be dismissed.

Pursuant to the notice issued on May 24, 1937, a hearing was held in New York City on June 7, 8, 9, 18, and 19, 1937, before Robert M. Gates, the Trial Examiner duly designated by the Board. The Board, the Hopwood Company, the Metal Polishers Union, and the Teamsters Union were represented by counsel. On June 9 a motion by the Board to amend the complaint was served on the parties concerned. In the course of the hearing on that day, the Trial Examiner, over the objection of counsel for the Hopwood Company, who appeared specially for the Monarch Retinning Company, Inc., herein called the Monarch Company, for the purpose of this motion, granted the motion of counsel for the Board to amend the complaint. The motion added the Monarch Company as a party respondent and added a paragraph, alleging in substance that the Hopwood Company, after the lock-out of its employees on March 31, 1937, discontinued its business and thereafter created the Monarch Company, a New Jersey corporation, with an office and principal place of busi-

ness in Jersey City, New Jersey; that the Monarch Company is now performing the same operations as were formerly engaged in by the Hopwood Company, and constitutes the same entity as the latter; and that the Monarch Company was organized by the Hopwood Company solely for the purpose of avoiding its obligations under the Act. Thereafter, on the same day, a copy of the original complaint, together with the motion to amend as granted, and an amended notice of hearing, was served upon the president of the Monarch Company. The amended notice allowed the Monarch Company five days in which to prepare an answer and specified that at the end of that period the hearing would be resumed on the matters set forth in the amended complaint relative to the Monarch Company.

The hearing was resumed on June 18. The Monarch Company appeared specially by counsel and made an oral motion to dismiss the complaint as to the Monarch Company on the ground that it was a different corporation and could not be made a party respondent by merely amending the original complaint in the absence of any charges previously filed against it. The motion was denied. Counsel for the Board then offered in evidence an amended charge, dated June 18, directed against both the Hopwood Company and the Monarch Company. This was admitted. Counsel for the Monarch Company thereupon decided to appear generally and made a motion that the testimony which had been offered prior to that time be stricken in so far as it purported to be testimony directed against the Monarch Company. The motion was denied subject to a reconsideration in the event that the Monarch Company did not have the opportunity to cross-examine any of the witnesses who had previously testified on matters charged against it. Counsel for both companies made a motion that the case against the Hopwood Company be completed by the Board before the case against the Monarch Company was heard. The motion was denied.

At the hearing on June 19, the Monarch Company filed its answer to the amended complaint, denying all pertinent allegations of the complaint, except the identity of the corporation, and alleging that the Board has no jurisdiction over it, on the grounds that the activities and operations of the Monarch Company do not constitute interstate commerce, that it is a distinct, separate, and independent legal entity, and that no complaint has ever been issued against it pursuant to a proper charge. The answer, finally, requested that the complaint against the Monarch Company be dismissed.

During the course and at the close of the hearing on June 19, counsel for the Monarch Company pressed the motion to dismiss on the ground that the Monarch Company was not properly before the Board for the reasons set forth in its answer. The motion was denied.

The authority of the Board to issue a complaint is necessarily predicated upon the filing of a charge. The charge, however, does not serve as a limitation upon the scope of the complaint or amendments thereto. We believe, therefore, that the Trial Examiner properly granted the motion of counsel for the Board to amend the complaint by adding, as a party respondent the Monarch Company, which, as we find hereafter, was organized by the Hopwood Company for the purpose of evading its obligations under the Act. The ruling of the Trial Examiner is hereby affirmed.

During the hearing, the Trial Examiner reserved ruling on the objection of counsel for the Hopwood Company to the admission in evidence of a copy of a proposed agreement between the Monarch Company and certain employees. The objection is hereby overruled. At the close of the hearing, the Trial Examiner also reserved ruling on the objection of counsel for the Hopwood Company to the admission in evidence of a second amended charge, containing the same allegations but in greater detail. The objection is overruled.

During the hearing, at the conclusion of the presentation of evidence by the Board's counsel, and again at the conclusion of the hearing, the Hopwood Company urged the motion to dismiss the complaint against it, on the ground that the evidence adduced had not sustained the allegations of the complaint. The motion was denied. At the conclusion of the Board's case, counsel for the Board moved to amend the pleadings to conform to the proof. The motion was granted over objection.

We have reviewed these rulings and all other rulings made by the Trial Examiner on motions and on objections to the admission of evidence and find that no prejudicial errors were 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. Counsel for both respondents filed briefs to which we have given due consideration.

Thereafter, an Intermediate Report was filed by the Trial Examiner, and exceptions thereto were duly noted on behalf of both respondents. Argument on the exceptions was had before the Board on October 11, 1937, and further briefs were filed.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

The respondent, Hopwood Retinning Company, Inc., is a New York corporation, having its office and principal place of business in Brooklyn, New York. For about fifteen years prior to March 31, 1937, it

was engaged principally in the business of retinning and servicing milk and ice cream cans or containers, usually owned by dairies and creameries. It employed about 191 production employees and 17 truck drivers and helpers. The principal raw materials used were tin, tallow, sawdust, soldering fluid, cotton waste, chemicals, lead, and sulphuric, nitric, and muriatic acids. The purchases of raw materials in 1936 aggregated in value \$130,778.41. The volume of its business for 1936 totalled \$621,967.70, and for the first three months of 1937, \$140,339.82.

Containers in need of retinning and reconditioning were delivered by its customers to the truck drivers operating the Hopwood Company's trucks. The truck drivers delivered the containers or, in some instances, arranged for their delivery by freight car, to the plant of this respondent in Brooklyn. At the plant, the containers were placed in bins and held ready for call by the customers. Upon call they were then taken out of the bins and processed. The process included straightening, removal of rust and solder, retinning, and resoldering. If necessary, new bottoms or other parts were supplied by the Hopwood Company and included in the service charge. Five or six salesmen were employed to solicit business from prospective customers. The Hopwood Company advertised largely through trade papers although, occasionally, it resorted to direct-mail advertising.

It operated about twelve trucks, in addition to one permanently assigned to Boston. Three or four trucks were regularly assigned to the metropolitan area of the City of New York. The remainder of the trucks had fairly well-established routes radiating from New York City to adjacent points within the State, as well as remote points outside the State. The drivers whose routes carried them outside New York City spent from two days to two weeks on each trip, delivering the reconditioned containers and collecting containers to be reconditioned. On the longer trips, when more than a truck load of containers was collected, it was customary for the driver to load a freight car at some central point and have it shipped to the plant by rail.

Raw materials were practically all purchased from concerns located in New York City, less than one-half of one per cent having been secured from outside the State of New York. However, a substantial portion of the business was derived from states other than the State of New York. According to Hopwood's testimony, the interstate business in 1936 amounted to \$143,881.73, or 23 per cent of the total volume, and in the first three months of 1937, to \$38,058.12, or 27 per cent of the total volume. The truck drivers gave much higher estimates as to the volume of business originating outside the State.

The territory covered by the truck drivers in the collection and distribution of containers serviced by the Hopwood Company was

considerable. It comprised most of the New England and Middle Atlantic States, and included Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, New Jersey, Pennsylvania, Delaware, Maryland, Washington, D. C., Virginia, and West Virginia.

Some of the containers serviced were used by their owners in the transportation of milk and ice cream in interstate commerce. The record shows that the Hopwood Company, in addition to its regular business as described above, purchased used containers, which were reconditioned and sold. It had several customers who purchased these "resale cans", but only one Boston company purchased an appreciable quantity.

On March 31, 1937, the Hopwood Company ceased to engage in the business of reconditioning milk and ice cream containers. It is now functioning as the exclusive sales agency for the Monarch Company, which company is now performing all the reconditioning operations at its plant in Jersey City, New Jersey. The Monarch Company serves practically the same customers as were served by the Hopwood Company. At least 77 per cent of its business is derived from states other than the State of New Jersey. The details of the organization of the Monarch Company and its importance in this case are set forth hereafter.

II. THE UNIONS

Metal Polishers, Buffers, Platers and Helpers International Union, Local No. 8, affiliated with the American Federation of Labor, is a labor organization which admits to membership persons engaged in the work of metal polishing, buffing, or plating.

Milk Drivers Local No. 584, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, affiliated with the American Federation of Labor, is a labor organization which admits to membership any teamster, chauffeur, or helper employed by a company dealing in milk or milk products.

III. THE UNFAIR LABOR PRACTICES

A. *The lock-out of March 31, 1937*

1. Events preceding the lock-out

Prior to March 14, 1937, Thomas O'Leary, president of the Teamsters Union, was approached by certain of the truck drivers of the Hopwood Company, who requested that they be organized. At a meeting held on March 14, 15 out of the 17 truck drivers and helpers of the Hopwood Company signed application blanks for membership in the Teamsters Union and were admitted to the organization. The next day, March 15, O'Leary called John A. Hopwood, president

of the Hopwood Company, and made an appointment with him for that afternoon to present him with a formal agreement on behalf of the truck drivers and helpers. The meeting was attended by Hopwood, O'Leary, and Liebler, secretary-treasurer of the Teamsters Union. The agreement was presented to Hopwood, who looked it over and said he would inform the union officials in a few days as to what action he would take. On March 17, O'Leary called at the office of the Hopwood Company, but was unable to see Hopwood, who was absent because of illness. However, Daniel J. Byrne, attorney for the Hopwood Company, was at the office and O'Leary spoke with him regarding the proposed agreement. According to O'Leary's testimony the terms of the agreement were apparently satisfactory to Byrne, who stated, however, that he had no authority to come to an agreement without the approval of Hopwood, but agreed to inform him of Hopwood's decision.

On March 18, the truck drivers and helpers went on strike for higher wages and better working conditions. On March 20, a conference was arranged with Hopwood and Byrne which resulted in a raise in pay for most of the men pending further negotiations. The men returned to work on Monday, March 22. On Thursday evening, March 25, Gustave Voigt and James J. Jones, truck drivers, and Alexander Dugan, a helper, were discharged. The following morning, the other drivers refused to operate the trucks unless the discharged men were reinstated. The discharge was reported to O'Leary at the union headquarters. Pursuant to a telephone conversation between O'Leary and Hopwood, the men were reinstated the same day. The reason given by the Hopwood Company for the discharge of these men, who were active in union matters, was that it intended to cease the operation of two trucks. However, Jones, one of the discharged men, testified with respect to his discharge as follows:

* * * I said, "Well, you know, Mr. Hopwood, you have got an agreement with the union," I said, "there is negotiations pending." I said, "You know that you told Mr. O'Leary that there would be no discrimination until the negotiations was completed." He said, "I have no negotiations with nobody, and there is no Union that will make me put you back to work."

Similarly, when Dugan, another discharged employee, reminded Hopwood that the men, upon going back to work, were given to understand that no one would lose his job until negotiations commenced again, Hopwood said, "I can fire whoever I please," and, "You can stand here until all Hell freezes over, before this Union is going to force me back."

On March 25, Richard M. Quinn, business representative of the Metal Polishers Union, met with about fifteen production employees of the Hopwood Company to discuss the question of organization. Thereafter, a meeting place in the vicinity of the Hopwood Company's plant was secured and on Tuesday evening, March 30, as the men were leaving the plant, leaflets were distributed to them announcing a meeting for the same night. The meeting was attended by about 61 of the production employees, almost all of whom signed application cards for membership in the Metal Polishers Union at that time. Several supervisory employees of the Hopwood Company were standing outside the meeting hall, and observing. Hoagland, one of its vice presidents, passed by in his car a number of times.

Jones testified that sometime between March 15 and 18, a union driver was removed from a truck and replaced with another driver. Jones approached Hopwood and told him about the agreement to negotiate with the Teamsters Union and his (Hopwood's) statement that there would be no discrimination against the workers. Hopwood then said: "I will ask you one thing, and I will give you \$1,000 if you can tell me who started this Union business."

Jones also testified on cross-examination that sometime between March 15 and 25, Watson, a vice president of the Hopwood Company, said to him: "Why don't you forget this union business? Why don't you go out and see the boys yourself? Why don't you form a company union? You will get more out of a company union than you will out of an outside union."

One of the production employees testified that on the morning of March 29, he heard the superintendent, Benny Matuzarelli, say, "that if any of the tanners were trying to do the same as Jones did, better put your lockers in your bag and scam out."

The above-mentioned discharges of Voigt, Jones, and Dugan on March 25, the surveillance of the meeting of the Metal Polishers Union on March 30, and the expressions of antiunion bias testified to by the employees of the Hopwood Company are not a basis of the complaint in this case. They are indicative, however, of the general attitude of the Hopwood Company towards unions and union organization prior to March 31, 1937.

2. The lock-out

On the morning of March 31, the Hopwood Company closed its plant, refused to permit the employees to go to work, and paid them off with checks which had been made out during the night. Police officers were present to prevent the employees from congregating and

remaining on the street and sidewalk adjacent to the plant. Jones testified that when he arrived at the plant that morning to go to work, Hopwood told him that the plant was closed because "some of this bunch went and joined the Union last night." According to Jones, Hopwood said further, "Yes, they were out here last night and went and joined the Union and I decided to close the place this morning." According to Hopwood's testimony, the drivers were also paid off, but they were told that they could continue working by the day. This they refused to do. Jones, however, testified that Hopwood called him aside and told him to keep the chauffeurs together since he might want "to pull some trucks out." Jones, in accordance with Hopwood's request, kept the men together outside of the garage door. Thereafter, the timekeeper came out of the factory and paid them off. Hopwood then inquired whether Jones had the men together and asked him to call O'Leary. Jones called but found O'Leary out. Later, however, Hopwood denied requesting Jones to call O'Leary and told him to get "off the block." The testimony of Jones is substantiated by Voigt. Voigt testified that he was standing in a group when Hopwood came over and said, "Stand around. I expect to take some trucks out," but that a little later they were paid and chased off the street by the police.

We see no reason to disbelieve the testimony of Jones and Voigt and we find that the drivers and helpers as well as the production employees were prevented from working on the morning of March 31.

It is the contention of the Hopwood Company that a sit-down strike was contemplated by the union men among its production employees and that the plant was closed in order to protect its property. Hopwood testified that on the afternoon of March 30, two employees of the Hopwood Company reported that they had overheard conversations to the effect that the men were going to strike, and that the same evening a policeman "coming along the street, informed us that he had intimations that they were going to have a sit-down strike in our place and that there was food stored in the plant." Hopwood further stated that he searched a few places in the plant and found two dozen eggs, four cans of coffee, and about three or four cans of tea. The evidence on this point is far from convincing, especially in view of the fact that the first organizational meeting of the production employees was held the previous night and none of the men had been back in the plant before it was closed. Moreover, Hopwood, by his own admission, does not attach any importance to the small amount of food which he claims to have found in the plant. He stated as follows: "I don't say that that is sufficient evidence to warrant us closing down, but we closed down anyway because sit-down strikes were prevalent."

The contention with respect to a sit-down strike impresses us as being an afterthought, seized upon by the Hopwood Company in an attempt to justify its conduct. A consideration of all the testimony with respect to the closing of the plant, especially when viewed in the light of events prior to the closing and subsequent events, as hereinafter set forth, leads to the conclusion, that the Hopwood Company was actuated by its antagonism to the Unions and closed the plant in order to thwart union organization among the men. The closing of the plant on March 31, must, therefore, be regarded as a mass discharge of the employees in violation of the Act.

Following the lock-out, another meeting was held by the Metal Polishers Union about 10 o'clock that morning, attended by most of the production workers who had not attended the night before. About 103 additional men signed applications for membership and paid the initiation fee.

On April 2, a conference took place between the representatives of the Hopwood Company and the Metal Polishers Union.² The Hopwood Company submitted to the Union a proposed contract which was prepared in conjunction with L. L. Balleisen of the Brooklyn Chamber of Commerce and which, as we conclude hereafter,³ constitutes in effect an antiunion or "yellow dog" contract of employment, discriminatory in regard to terms or conditions of employment and discouraging to membership in a labor organization. On April 5, the Hopwood Company sent to its production employees a circular letter which read in part as follows:

The Company does not intend to have a closed shop, nor does it intend to sign any contract with any union. The Company agrees that the question of a man's belonging to a union is one which he can decide for himself. The contract [proposed by the Hopwood Company] does not bar membership in a union. The Company feels that no man need pay money or tribute to anybody in order to work in its plant, and that no man need belong to a union in order to work there.

Do not be misled by outside agitators whose only desire is to collect dues from you. The contract offered you by the Company will give you more than any contract that the union can possibly get for you. * * *

Please give this matter deep consideration. If you desire to return to work you may do so by applying for your job and signing the agreement offered by the Company.⁴

² This conference, as well as the subsequent ones, are discussed *infra*, Part III, C, 3.

³ See *infra*, Part III, C, 4.

⁴ Respondent's Exhibit No. 1.

This letter was followed by another letter dated April 8,⁵ which repeated the substance of the first letter and again urged the employees to accept the contract and return to work. These letters cannot be considered bona fide offers of reinstatement. They contain statements clearly designed to persuade the employees to sever their connections with the unions of their choice, they assert that the Hopwood Company has no intention of signing "any contract with any union," and they make it clear that the employees will not be reinstated unless they individually accept the contract proposed at the conference of April 2. It is evident, therefore, that in these letters, the Hopwood Company conditioned reinstatement upon abandonment by the employees of the rights guaranteed to them by the Act. Such an offer can only be treated as a refusal to reinstate.⁶

The letters of April 5 and 8, were not sent to any of the truck drivers and helpers, nor were any other overtures officially made to them by the Hopwood Company with respect to their reinstatement. Jones testified, however, that after the lock-out Hofmann, Hopwood's brother-in-law and a former superintendent of the Hopwood Company, approached him on the street, told him to forget all about the Unions, and offered to call Hopwood so that they could get together and form a company union of which Jones could be the head if he so wished.

We find that the production employees and the truck drivers and helpers of the Hopwood Company were discharged on March 31, 1937, because of their union membership and the activity of the Unions. Their discharges constitute interference with, restraint, and coercion of the respondent's employees in the exercise of the rights guaranteed in Section 7 of the Act and discrimination in regard to hire and tenure of employment, thereby discouraging membership in the Unions.

B. *The Monarch Company*

On April 15, at a time when various efforts were being made to bring together the Hopwood Company and representatives of the Metal Polishers Union and the Teamsters Union in order to arrive at an agreement, the Monarch Company was incorporated under New Jersey law. Byrne, counsel for the Hopwood Company acted as attorney for the Monarch Company in organizing it and was made its president. On the same day, the Hopwood Company effected a sale of most of its machinery to the Monarch Company. It is sig-

⁵ Respondent's Exhibit No. 2.

⁶ See *Matter of Benjamin Fainblott and Margorie Fainblott, Individuals, doing business under the firm names and styles of Somerville Manufacturing Company and Somerset Manufacturing Company and International Ladies' Garment Workers' Union, Local No 149*, 1 N. L. R. B. 864.

nificant that, according to Hopwood, this transfer of the equipment was discussed on April 12, when the contemplated transferee was not yet in existence. The equipment sold amounted in value to \$23,000, which, according to Hopwood, was charged or will be charged to the Monarch Company. At the time of the hearing, the Hopwood Company had received only \$2,000 in payment for the equipment. The Hopwood Company, likewise, transferred to the Monarch Company about a dozen of its trucks. It retained title to them, subject to an agreement to transfer title to the Monarch Company at the end of the present year. Some of the trucks still bear the name of the Hopwood Company while others have temporary signs bearing the name of the Monarch Company placed over the signs of the Hopwood Company.

The Hopwood Company still continues its corporate existence, but its activities are limited to those of a sales agency on a commission basis for the Monarch Company, which is performing the production work hitherto performed by the Hopwood Company for practically the same customers. In the installation of the equipment, the Monarch Company has utilized the services of employees of the Hopwood Company, including Hopwood and others on the managerial staff. These men are still paid by the Hopwood Company although Hopwood states that certain adjustments are being made whereby the Monarch Company will compensate the Hopwood Company for the services so rendered.

With the exception of the obligation presumably assumed by the Monarch Company to pay the purchase price of the equipment charged to it and to compensate for the value of the services supposedly under process of adjustment, no consideration appears to have been given to the Hopwood Company for the surrender of a business which totalled in volume \$621,967.70 for 1936. There is no evidence that the Monarch Company has any operating capital acquired through stock subscriptions or otherwise or any other assets besides the machinery and trucks transferred to it by the Hopwood Company. (No evidence appears in the record as to the purchase price, if any, of the trucks, title to which is to be transferred to the Monarch Company at the end of the present year.) The gross income of the respondent as a sales agency on the basis of commissions on sales was \$3,300.85 for six weeks in May and June.

The Monarch Company was organized with a capital stock of twenty non-par shares. Byrne, who became president, holds nine shares; Mrs. Goodine, who was a vice president of the Hopwood Company and is now secretary-treasurer of the Monarch Company, holds ten shares; and a clerk in Byrne's office holds one share. Byrne testified that in each case the stock was given for services rendered in the organization of the Monarch Company, or for services to be

rendered in the future, admitting, however, that the clerk was a "dummy." He also admitted that the stock had brought no dividend and had no actual saleable value. None of these stockholders own any stock of the Hopwood Company.

The legal separation of control and ownership does not, however, conceal the relationship between the Hopwood Company and the Monarch Company, nor the purpose for which the Monarch Company was formed. In view of all the circumstances, the conclusion is inevitable that the Monarch Company is but the alter ego of the Hopwood Company, operated for its benefit, and controlled by it.

Not only did the Monarch Company engage in the same production activities, but it also adopted the same labor policies. Employees of the Hopwood Company were admittedly solicited to go to work at the Monarch Company, and a number were actually so employed. However, employment at the Monarch Company was conditional upon signing an individual contract with the Monarch Company similar to the contract proposed by the Hopwood Company. Byrne testified that he did not recall any person working at the Monarch Company who had not signed such a contract and admits that it is the policy of the Monarch Company to have the employees sign such contracts. The record also contains testimony by union witnesses to the effect that various persons connected with the management of the Hopwood Company sought to persuade employees to drop their membership in the unions and return to work at the Monarch Company or to form a company union at the Monarch Company. These assertions are contradicted by witnesses for the Hopwood Company. However, the accounts given by the union witnesses are more consistent with the evidence as a whole.

The Hopwood Company advances no plausible reason for the discontinuance of its production activities. Nor does any such reason appear in the record. In the light of the entire record, it is clear that the cessation of the production activities and the formation of a new entity constituted a deliberate plan to avoid dealings with the Unions, and a barefaced attempt to evade the Act. Hopwood testified that the closing of the plant on March 31, was intended at the time merely as a temporary suspension of operations. According to him, the Hopwood Company decided to discontinue operations in Brooklyn on about April 12, after the production employees failed to return to work pursuant to the letters of April 5 and 8. It becomes apparent that the Hopwood Company was resolved to prevent the unionization of its plant at any cost. To this end, it first closed the plant and then attempted to compel its employees individually to sign what is essentially a "yellow dog" contract. The refusal of the employees to sign the contract impelled the Hopwood Company to take the

final and most drastic step, namely, to cease operations in Brooklyn and form another corporation in New Jersey.

The Hopwood Company cannot by such a device avoid its plain obligation under the Act and nullify completely the rights of its employees. It does not lie in the mouth of the Hopwood Company to say that it is no longer in a position to reinstate and make whole its employees. The Hopwood Company itself has deliberately brought about this situation and must bear the consequences thereof.

We find that the Hopwood Company by ceasing operations at its plant in Brooklyn, New York, and organizing the Monarch Company in Jersey City, New Jersey, for the purpose of avoiding its obligations under the Act has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

C. The refusal to bargain collectively

1. The appropriate unit

The complaint alleges that the production employees, and the employees engaged in the collection and distribution of the milk and ice cream cans, constituted separate and appropriate units for the purpose of collective bargaining. The answer asserts that the latter employees are so few in number that both classes of employees comprised one unit.

The small number in a unit is not an important consideration in this case. The evidence shows that the Hopwood Company's truck drivers and their helpers devoted practically all their time to the duties involved in operating and loading the trucks, duties separate and distinct from those performed by the production employees.

We therefore find that the production employees and the truck drivers and helpers employed by Hopwood Retinning Company, Inc., constitute, respectively, two separate units appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment, and such units insure to the employees the full benefit of their rights to self-organization and to collective bargaining, and otherwise effectuate the policies of the Act.

2. Representation by the Unions of a majority in the appropriate units

The Hopwood Company never challenged the claim that the Metal Polishers Union and the Teamsters Union represented a majority of the employees in the respective units. At the hearing there were introduced into evidence 165 application cards for membership in

the Metal Polishers Union signed by the production employees.⁷ It was testified by Quinn, business representative of the Metal Polishers Union, that 61 of these application cards were signed on March 30 and the balance on March 31. A comparison of the application cards with the list of the production employees as of the date of the lock-out, submitted at the hearing by counsel for the Board and checked by the Hopwood Company against its pay roll, discloses that on March 31 at least 158 of the 191 production employees of the Hopwood Company were represented by the Metal Polishers Union.

There were also introduced into evidence 15 application blanks for membership in the Teamsters Union signed by the truck drivers and helpers.⁸ O'Leary, president of the Teamsters Union, testified that all the application blanks were signed in his presence on March 14. The names on the application blanks correspond with the names appearing on the list of the Hopwood Company's truck drivers and helpers as checked against its pay roll.

We find that on March 31, 1937, and at all times thereafter, the Metal Polishers Union, and on March 14, 1937, and at all times thereafter, the Teamsters Union, were the duly designated representatives of a majority of the employees in each of the respective appropriate units. Pursuant to Section 9 (a) of the Act, they were the exclusive representatives of all the employees in such units for the 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 April 1, the day following the lock-out Quinn contacted Hopwood over the phone and arranged a conference for the following day. The conference, which took place at the office of the Hopwood Company, was attended by Quinn and W. W. Britton, International President of the Metal Polishers Union, and Hopwood, Byrne, and Balleisen of the Brooklyn Chamber of Commerce, of which the Hopwood Company is a member. After the meeting was called to order by Balleisen, Quinn submitted to him a proposed agreement intended to be entered into between the Hopwood Company and the Metal Polishers Union. According to Quinn, Balleisen "casually looked over" the agreement and said that it was typical of all union agreements. Thereafter, Britton and Balleisen "went into a talk on economics" not directly relevant to the matters at issue. Balleisen assured the Union representatives that they were entitled to the privileges of collective bargaining and submitted the Hopwood Company's proposed antiunion or "yellow dog" contract, which had pre-

⁷ Board's Exhibit Nos. 9 and 10.

⁸ Board's Exhibit, Nos. 6-A, 6-B, and 6-C.

viously been prepared at a conference held between Hopwood, Byrne, and Balleisen at the Brooklyn Chamber of Commerce.⁹

Following the conference, Quinn called a meeting of the production employees for the following day, April 3, and submitted for their consideration the contract proposed by the Hopwood Company. The meeting was attended by upwards of 155 men who voted unanimously against its acceptance. Later the same day, Quinn phoned Hopwood and informed him that the contract had been rejected and, according to Quinn, told him "that under no circumstances could we again go into conference unless it was mutually understood that the Union recognition would be understood." Hopwood then requested him to wait for an answer. He called Quinn shortly and informed him that his proposal of union recognition was rejected.

Subsequent to the conference of April 2, the Hopwood Company sent the letters of April 5 and April 8 to the production employees soliciting individual employees to sign the contracts and return to work. On April 15, Sturm, counsel for the Unions, wrote a letter¹⁰ to Byrne requesting that a conference be arranged. On April 17, Sturm met Byrne in court and requested an appointment on behalf of the Unions for that afternoon or the following day. Sturm was anxious to deal with the Hopwood Company immediately, for he had been informed by members of the Union that a substantial part of the machinery of the Hopwood Company was being moved elsewhere, and he was under the apprehension that unless an agreement was reached immediately there would be no basis for any discussion between the Unions and the Hopwood Company. The conference was finally arranged for April 23, subsequent to the removal of a large part of the machinery to New Jersey. It was attended by Hopwood, Byrne, and one or two other officials of the Hopwood Company and by Quinn, O'Leary, and two employees. It lasted only about two minutes because the Hopwood Company was adamant in its refusal to recognize the Unions by entering into an agreement with them. O'Leary testified that Byrne, as counsel for the Hopwood Company, stated that although the Hopwood Company had no objection to the employees joining the Union, it would at no time recognize any union. O'Leary's testimony is, in substance, supported by Quinn. While Byrne contested this testimony, he admitted stating that the Hopwood Company would under no circumstances make an agreement with the Union.

On May 4, a third conference took place in Jersey City, on the street in front of the plant of the Monarch Company, between Hopwood, Byrne, Quinn, O'Leary, representatives of the New Jersey

⁹ The provisions of this contract are discussed *infra*, Part III, C, 4.

¹⁰ Board's Exhibit No 13.

locals of the Metal Polishers Union and the Teamsters Union (to which O'Leary had transferred the membership of the respondent's truck drivers and helpers), and the shop stewards of the production employees and the truck drivers. According to O'Leary, the Hopwood Company persisted in the stand that although it had no objection to the men joining an organization, it would not deal directly with any union whatsoever. Similarly, Quinn testified that "they did not want to do business and recognize the union."

4. Conclusion with respect to the refusal to bargain

The Hopwood Company, in its contention that it never refused to bargain collectively with the representatives of the employees, seems to operate under the misconception that the mere recognition of Quinn and O'Leary as representatives of the Unions representing a majority of the employees in the respective units constituted full compliance with the provisions of the Act requiring collective bargaining, and that it was under no obligation to bargain in good faith with respect to an agreement with the Unions. Byrne testified as follows:

A. . . . My position was this: We would not sign a contract with the union or anybody else not working at our place. We would have only signed a contract with our employees with a bargaining committee, rather, chosen by them, and under no circumstances would we have a closed shop. Now that is our position throughout these proceedings.

Hopwood testified to the same effect:

A. We would not have a closed shop, or a contract with the union.

Q. You would not have a closed shop which was only a contract with the union?

A. A signed contract.

Q. With the union?

A. With the union, correct.

Q. And your position was that if there was to be a contract it was to be with a committee of your own employees, isn't that so?

A. Yes.

From its own admissions and from the testimony as a whole, it is clear that the Hopwood Company categorically refused to bargain concerning any agreement with the Unions themselves, whether or not it involved a closed shop, and declared that it had a fixed policy precluding a contract with any union. Although it is not requisite to collective bargaining that an employer should reach an agreement

as the result of such bargaining with the representatives of its employees, no bargaining can be said to take place when the employer, as in this case, sets forth various bars to the bargaining rights of employees guaranteed under the Act. It is clear that his statement that he would never sign a contract with the Union but would do so only with a committee of his employees amounts to a stubborn refusal to bargain collectively with the representatives of his employees in an effort to reach an agreement.

The Hopwood Company further contends that it did not refuse to bargain collectively because it submitted its proposed "Balleisen contract" to the representatives of the Unions. The contract¹¹ purports to be an agreement between the Hopwood Company. "and the duly elected collective bargaining committee consisting of all the productive employees * * *, and each and every one of the productive employees of said company * * *." Although the contract is cleverly disguised as a collective agreement, it is expressly intended for individual signature by the employees and, therefore, constitutes an individual contract of employment.

In the contract, the Hopwood Company agrees not to lock out any employees because of any disagreement or dispute arising under the contract but reserves the right to discharge or lay off any or all of the employees "because required to do so by reason of seasonal slackness, lack of orders, dearth of business, or necessitated for repairs, removal or alteration of plant and/or equipment." The employees agree not to go on strike until May 1, 1942.

Pursuant to the contract, "any Employee has a right to join any union of his own choosing, or to refrain from joining any union. Furthermore, no employee or person working for the Employer shall be obliged or required to join any union. The Employees, or any of them, shall not and have not the right to demand a closed shop or recognition by the Employer of any union, and the Employer has the absolute and unqualified right to hire or discharge any Employee or Employees for any reason or for no reason and regardless of his or their affiliation or non-affiliation with any union." By the contract, it is "the intention of the Employer that Employees be not unjustly discharged. It is strictly understood and agreed, however, that the question as to the propriety of any Employee's discharge is in no event to be one for arbitration or mediation, and that any action of reinstatement, if any, will be taken voluntarily by the Employer if it deems such reinstatement advisable."

The contract further states that "all of the parties understand and agree that the propositions and questions of a closed shop and the recognition of a union are not and shall at no time be matters subject to or to be submitted to arbitration."

¹¹ Board's Exhibit No. 12.

In considering a substantially identical "Balleisen contract" on another occasion,¹² the Board said:

The contract deprives each employee who signs it of the right to strike until November 1, 1940, of the right to demand recognition of any union by the employer, and of the right to question discharges for any reason or no reason regardless of his affiliation or nonaffiliation with any union. Despite the lip-service rendered by the terms of the contract to the right of any employee to join any union of his own choosing, the agreement deprives each employee subscriber of the fundamental rights inherent in union affiliation and activity—the right to union recognition, which means the right to collective bargaining, the right to concerted activities for mutual aid or protection, which is guaranteed to employees in Section 7 of the National Labor Relations Act, and the right to protest against the employer's exercise of his most powerful anti-union weapon, discharge for union affiliation or activity. It would be hard to devise a more patently anti-union or "yellow dog" contract, or one more discouraging to membership in a labor organization.

Furthermore, by the letters of April 5 and 8, the Hopwood Company solicited its employees to return to work by signing these individual contracts. It thus attempted to bargain with the employees individually, although negotiations had been initiated for collective bargaining. By its tactics the Hopwood Company manifestly attempted to destroy the Unions here involved as effective instruments of representation of its employees. Such action by itself constituted an unfair labor practice within the meaning of Section 8 (1) and (5) of the Act.

We find that on April 2, April 23, May 4, and other dates, the Hopwood Company refused to bargain collectively with the Metal Polishers, Buffers, Platers, and Helpers International Union, Local No. 8 as the representative of its production employees, and that on April 23, May 4, and other dates, it refused to bargain collectively with Milk Drivers Local No. 584, of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, as the representative of its truck drivers and helpers, in respect to rates of pay, wages, hours of employment and other conditions of employment.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Hopwood Company set forth in Section III above, occurring in connection with its operations described in Sec-

¹² *Matter of Atlas Bag and Burlap Company, Inc. and Milton Rosenberg, organizer, Burlap and Cotton Bag Workers Local Union No. 2469, affiliated with United Textile Workers Union*, 1 N. L. R. B. 292.

tion I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

The Board has found that the lock-out of the production employees and the truck drivers and helpers of the Hopwood Company constituted interference with, restraint, and coercion of its employees in the exercise of the rights guaranteed in Section 7 of the Act and discrimination in regard to hire and tenure of employment discouraging membership in the respective unions. The appropriate remedy is plainly the reinstatement of such employees with back pay from March 31, 1937, the date of the lock-out, to the date of the offer of reinstatement.

A number of the Hopwood Company's employees have been reemployed by the Monarch Company. Lists submitted by the Hopwood Company show that at the time of the hearing, 24 of its employees were employed by the Monarch Company, and that during the latter part of April and the first part of May, 24 others had been employed by the Monarch Company, but had left such employment within a short time. There is no evidence to show that the latter employees left the Monarch Company otherwise than voluntarily. Reinstatement of the employees by the Monarch Company is equivalent to reinstatement by the Hopwood Company, provided it is reinstatement to regular and substantially equivalent employment. Therefore, our order of reinstatement will not apply to those employees who now have regular and substantially equivalent employment at the plant of the Monarch Company, or who have since the lock-out obtained such employment at the Monarch Company but have left it voluntarily. We will order, however, that these employees be given back pay for the period between the date they were locked out and the date they obtained regular and substantially equivalent employment.

If after reinstating the employees pursuant to our order and dismissing employees hired since March 31, 1937, it is determined that the services of any of the staff either at the plant of the Hopwood Company in Brooklyn, New York, or at the plant of the Monarch Company in Jersey City, New Jersey, as then constituted, are not required, the staff may be reduced, provided the reduction is made 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 Hopwood Company's business, subject to any modification introduced by agreement with the Metal Polishers Union and the Teamsters Union.

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

CONCLUSIONS OF LAW

1. Metal Polishers, Buffers, Platers and Helpers International Union, Local No. 8, and Milk Drivers Local No. 584, of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of its production employees and its truck drivers and helpers, and thereby discouraging membership in labor organizations, the Hopwood Company has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

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

4. The production employees and the truck drivers and helpers employed by the Hopwood Company constitute, respectively, two separate units appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

5. Metal Polishers, Buffers, Platers and Helpers International Union, Local No. 8, was on March 31, 1937, and has been at all times since, by virtue of Section 9 (a) of the Act, the exclusive representative of all such production employees for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

6. Milk Drivers Local No. 584 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, was on March 14, 1937, and has been at all times since, the exclusive representative of all such truck drivers and helpers for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

7. By refusing to bargain collectively with Metal Polishers, Buffers, Platers and Helpers International Union, Local No. 8, and Milk Drivers Local No. 584, of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, as the exclusive representative of its employees in the appropriate units, the Hopwood Company has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) 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.

ORDER

Upon the basis of the above findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, Hopwood Retinning Company, Inc., and Monarch Retinning Company, Inc., and their officers, agents, successors, and assigns, shall:

1. Cease and desist from discouraging membership in Metal Polishers, Buffers, Platers and Helpers International Union, Local No. 8, or Milk Drivers Local No. 584, of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, or any other labor organization of their employees, by locking out, or in any other manner discriminating in regard to the hire or tenure of employment or any term or condition of employment of any of their employees by reason of their membership in Metal Polishers, Buffers, Platers and Helpers International Union Local No. 8, or Milk Drivers Local No. 584 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers or any other labor organization of their employees;

2. Cease and desist from refusing to bargain collectively with Metal Polishers, Buffers, Platers and Helpers International Union, Local No. 8, or Milk Drivers Local No. 584, of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, as the exclusive representative of their production employees and of their truck drivers and helpers, respectively;

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

4. Cease and desist from using the services of L. L. Balleisen or any other person for the purpose of evading their obligations under the Act;

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

(a) Offer to the production employees and truck drivers and helpers of the Hopwood Company who were locked out on March 31, 1937, and who have not since that date received regular and substantially equivalent employment at the plant of the Monarch Company, immediate and full reinstatement to their former or equivalent positions

either at the plant of the Hopwood Company in Brooklyn, New York, or at the plant of the Monarch Company in Jersey City, New Jersey, without prejudice to their seniority and other rights and privileges;

(b) Make whole the production employees and truck drivers and helpers of the Hopwood Company who were locked out on March 31, 1937, for any losses of pay they have suffered by reason of their lock-out by payment to each of them, respectively, of a sum of money equal to that which he would normally have earned as wages during the period from March 31, 1937, the date of the lock-out, to the date of the offer of reinstatement, less any amount earned by him during such period;

(c) Upon request, bargain collectively with Metal Polishers, Buffers, Platers, and Helpers International Union, Local No. 8, as the exclusive representative of all their production employees, and with Milk Drivers Local No. 584, of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, as the exclusive representative of all their truck drivers and helpers, or with the respective affiliated organizations of the said unions to which the employees within the respective units may have transferred their membership, in respect to rates of pay, wages, hours of employment and other conditions of employment;

(d) Personally inform in writing each and every one of their employees who has entered into the individual contract of employment, whether in the form proposed by the Hopwood Company or by the Monarch Company, as set forth in the findings of fact above, that such contract was entered into pursuant to an unfair labor practice within the meaning of the National Labor Relations Act and will therefore be discontinued as a term or condition of employment and will in no manner be enforced or attempted to be enforced;

(e) Post notices in conspicuous places at the plant of the Hopwood Company in Brooklyn, New York, and at the plant of the Monarch Company in Jersey City, New Jersey, stating (1) that the respondents will cease and desist in the manner aforesaid; and (2) that the individual contracts of employment which have been entered into with their employees are in violation of the National Labor Relations Act and will no longer be offered, solicited, entered into, continued, enforced or attempted to be enforced;

(f) Maintain such notices for a period of 30 consecutive days from the date of posting;

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