

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT threaten our employees with discharge if they join or remain members of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 13.

WE WILL NOT interfere with the above-named Union's efforts to organize our employees, or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 13, or any other labor organization, 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, or to refrain from any and all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act.

WE WILL make Robert Duane Moore whole for any loss of wages suffered as a result of our discrimination against him.

All our employees are free to become or remain members of the above-named Union, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the amended Act. We will not discriminate in regard to hire or tenure of employment or any other term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

GARDNER CONSTRUCTION COMPANY,
Employer.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

**Indiana Gas & Chemical Corporation and James L. Watkins
Local 12009, United Mine Workers of America, Region 40 and
James L. Watkins**

**District No. 50, United Mine Workers of America and James
L. Watkins. Cases Nos. 25-CA-1138, 25-CB-363, and 25-CB-
372. March 22, 1961**

DECISION AND ORDER

On June 23, 1960, Trial Examiner Max M. Goldman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, but that the Respondent Unions had not engaged in and were not engaging in certain other unfair labor practices, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel, the Respondent Company,

and the Respondent Unions filed exceptions to the Intermediate Report, and Respondents filed supporting briefs.¹

The Board has reviewed the rulings of the Trial Examiner made at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and the briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only to the extent consistent with our decision herein.

The Trial Examiner found that the Respondent Company violated Section 8(a)(1) and (3) of the Act when it discharged James L. Watkins. For the reasons stated below we disagree.

The record shows Watkins, a nonunion employee, was discharged for engaging in a heated argument with another employee. The subject matter of the argument was the Indiana "right-to-work" law and Watkins' refusal to join the Respondent Unions; the credited evidence, however, fails to establish that the Respondent Company's officials knew the subject matter of the argument. Nor is there any evidence that this argument was utilized as a pretext to disguise some other motivation. The issue, then, is whether a discharge for engaging in conduct, which, for the purposes of this decision we assume, was in fact a protected concerted activity, can be found to be unlawful in the absence of knowledge by the Company of the facts establishing the protected concerted nature of the activity.

On this issue the decision of the Board in *Walls Manufacturing Company, Inc.*, 128 NLRB 487, is, in our opinion, controlling and compels a negative answer. In that case an employee was discharged for engaging in conduct which was in fact a protected concerted activity, but it was not until after the discharge that the respondent there learned of the facts which established the concerted nature of the conduct. In finding that the discharge there was not unlawful, the Board stated:

In order to sustain a finding of a violation based on the discharge, it is necessary to establish that at the time of the discharge the Employer had knowledge of the concerted nature of the activity for which the employee was discharged.

Moreover, the *Cusano* and *Salt River* cases, relied on by the Trial Examiner, are in our opinion clearly distinguishable from the instant case. In both of those cases the respondents knew the facts which established that the dischargees were engaging in protected concerted activity. Thus, the conclusion in those cases, that in such circum-

¹The request of the Respondents for oral argument is denied because the record, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

stances a good-faith belief that the facts as known established unprotected rather than protected activity was no defense when the activity was in fact protected, is not precedent for the conclusion of the Trial Examiner here, that ignorance of the facts is no defense.

Nor can we accept the reasoning of our dissenting colleague as a basis for finding that the Respondent Company violated Section 8(a)(1). Any finding as to disparate treatment of Watkins is based on the assumption that Long, the other participant in the argument, was not disciplined. The question whether Long was disciplined was not, however, litigated at the hearing, and there is nothing in the record to establish that he was in fact not disciplined. In any event, it must be established that interference with Section 7 rights resulting from a discharge was a foreseeable result of any disparate treatment where, as here, no interference was intended. Thus, in *The Radio Officers' Union of the Commercial Telegraphers Union, AFL (A. H. Bull Steamship Company) v. N.L.R.B.*, 347 U.S. 17, 44-46, where, as in the *Price Valley* case cited by our dissenting colleague, the respondents were aware of the relevant facts, the holding of the courts was that in such circumstances it was immaterial that there was no specific intent to encourage or discourage union membership, or to interfere with Section 7 rights. Indeed, the holding in these cases falls far short of supporting our dissenting colleague's conclusion that the Respondent Company here is responsible for unintended consequences which could not have been foreseen because the facts were unknown.

For the foregoing reasons, therefore, we will reverse the Trial Examiner as to Watkins, and dismiss the complaint as to him. In all other respects we agree with the violations found by the Trial Examiner.

ORDER

Upon the entire record in these cases, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. The Respondent Company, Indiana Gas & Chemical Corporation, Terre Haute, Indiana, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Encouraging membership in the Respondent Unions by maintaining or hereafter executing an agreement limiting pensions to union members, or maintaining, enforcing, or hereafter executing an agreement limiting health insurance to union members, or denying health insurance benefits to an employee because he is not a member of the Respondent Unions or any other labor organization of its employees.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to

form, join, or assist any labor organization, including the above-named labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities.

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

(a) Jointly and severally with the Respondent Unions make James Bailey whole for any loss suffered by him by reason of his not receiving health insurance benefits as set forth in the section of the Intermediate Report entitled "The Remedy."

(b) Post at its plant at Terre Haute, Indiana, copies of the notice attached hereto marked "Appendix A."² Copies of such notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by an authorized representative of the Respondent Company, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Company to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for the Twenty-fifth Region, in writing, within 10 days from the date of this Order, what steps the Respondent Company has taken to comply herewith.

B. The Respondent Unions, Local 12009, United Mine Workers of America, Region 40, and District No. 50, United Mine Workers of America, Terre Haute, Indiana, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause the Respondent Company, its officers, agents, successors, or assigns, to discriminate against its employees in violation of Section 8(a)(3), by maintaining, enforcing, or hereafter executing a contract limiting health insurance benefits to union members, or by denying health insurance benefits to an employee because he is not a member of the Respondent Unions, or by maintaining or hereafter executing a pension agreement limiting benefits to members of the above-named labor organizations.

(b) In any manner restraining or coercing employees of the Respondent Company in the exercise of the rights guaranteed in Section 7 of the Act, including the right to refrain from engaging in any or all of the activities guaranteed thereunder.

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

² In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

(a) Jointly and severally with the Respondent Company make James Bailey whole for any loss suffered by him by reason of not receiving health insurance benefits as set forth in the section of the Intermediate Report entitled "The Remedy."

(b) Post at their offices and meeting halls at Terre Haute, Indiana, copies of the notice attached hereto marked "Appendix B."³ Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by a representative of each of the Respondent Unions, be posted by them immediately upon the receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by them to insure that said notices are not altered, defaced, or covered by any other material.

(c) Promptly mail to the said Regional Director signed copies of "Appendix B" for posting at the Company's Terre Haute facilities.

(d) Notify said Regional Director in writing, with 10 days from the date of this Order, what steps the Respondent Unions have taken to comply herewith.

MEMBER FANNING, dissenting in part:

I join the majority opinion to the extent it adopts the findings, conclusions, and recommendations of the Trial Examiner. However, I dissent from the majority's dismissal of those portions of the complaint which allege that the discharge of Watkins violated the Act. I agree with the Trial Examiner that Respondent's lack of knowledge of the substance of the "heated argument" for which it discharged Watkins⁴ is no defense to the allegations of the complaint.

The facts involving Watkins' discharge are simple and not in dispute. Watkins, opposed to union membership, and Long, a vocal and ardent union adherent, were engaged in a heated argument concerning the necessity of Watkins' joining the union as a condition of continued employment. This argument took place in the employees' lockerroom, before work had started on the morning of March 6, 1959, in the presence of other employees. Though Respondent was not apprised of the substance of the argument, the record clearly shows that the content and substance became known to other employees who were present during the argument. Upon hearing of the argument, but without investigation, Respondent precipitately discharged Watkins, but took no action against Long the other participant in the argument. On these facts, I conclude that Respondent violated Section 8(a) (1).

³ See footnote 2, *supra*.

⁴ I accept the majority's finding that Watkins was discharged because he engaged in a "heated argument."

Section 7 of the Act guarantees to employees not only the right "to form, join, or assist labor organizations," but also the "*right to refrain from any or all such activities.*" The right to "refrain" need not be exercised in concert with other employees. Clearly, the "right to refrain" carries with it the right to discuss, argue, or dispute the matter with union adherents, with the same freedom enjoyed by them. Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." The discharge of Watkins, the anti-union employee, for engaging in a "heated argument" when viewed against the lack of any disciplinary action, as to Long, the prounion employee who engaged in the same "heated argument," could have no other effect on employees who witnessed the argument than to impress upon them the favored position of the union and consequent freedom of union adherents to express their views: a freedom denied to antiunion employees. Watkins' discharge, therefore, necessarily discouraged employees from exercising the right to refrain from union activity and encouraged union activity and membership. In these circumstances, Watkins' discharge interfered with employees' exercise of rights guaranteed by Section 7 within the meaning of Section 8(a)(1). This consequence of Watkins' discharge flows from the fact of employees' knowledge of the antiunion and union positions taken by Watkins and Long during the argument, and the Respondents' precipitate and disparate treatment of them for engaging in the argument. It is therefore clear that Respondent's lack of knowledge of the substance of the argument is immaterial in evaluating the impact of Watkins' discharge on the employees' exercise of the rights guaranteed by Section 7. It is also immaterial that Respondent was not motivated by a desire to infringe such rights, for "it is the effect and not the motivation of his action which determines whether he has violated Section 8(a)(1)."⁵

Accordingly, I find that Respondent Company violated Section 8(a)(1) of the Act by its discharge of James L. Watkins. I deem it unnecessary, however, to decide whether such discharge also violated Section 8(a)(3) inasmuch as the remedy necessary to effectuate the policies of the Act would be the same in either case.

CHAIRMAN McCULLOCH took no part in the consideration of the above Decision and Order.

⁵ *J. E. McCatron, R. F. Nine and M. M. Dinkel, d/b/a Price Valley Lumber Co., et al. v. N.L.R.B.*, 216 F. 2d 212 (C.A. 9). The majority, in answer to this dissent, plainly ignores the distinction drawn by the court as to the necessity of proving motivation in 8(a)(1) and (3) cases. In the former, no showing that an employer intended to interfere with the rights of his employees, as guaranteed in Section 7, is necessary. Only a showing that its conduct did so interfere is required. In the latter, unlawful motivation is a necessary element of the violation, however, such motivation may be conclusively presumed in appropriate cases.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL NOT encourage membership in Local 12009, United Mine Workers of America, Region 40, or District No. 50, United Mine Workers of America, or any other labor organization of our employees, by maintaining or hereafter executing a pension agreement limiting benefits to members of the above-named labor organizations, maintaining, enforcing, or hereafter executing a health insurance agreement limiting benefits to members of the above-named labor organizations; or by denying health insurance benefits to an employee because he is not a member of the above-named labor organizations.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Labor Management Relations Act, including the right to refrain from any or all of the activities guaranteed thereunder.

WE WILL jointly and severally with the above-named labor organizations make James Bailey whole for any loss suffered by him because of not receiving health insurance benefits under our contract with these labor organizations.

All our employees are free to become, remain, or to refrain from becoming or remaining members of the above-named labor organizations or any other labor organization.

INDIANA GAS & CHEMICAL CORPORATION,
Employer.

Dated----- By-----
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

NOTICE TO ALL MEMBERS OF LOCAL 12009, UNITED MINE WORKERS OF AMERICA, REGION 40, AND DISTRICT NO. 50, UNITED MINE WORKERS OF AMERICA

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify you that:

WE WILL NOT cause or attempt to cause Indiana Gas & Chemical Corporation, its officers, agents, successors, or assigns, to discriminate against its employees by maintaining, enforcing, or hereafter executing a contract limiting health insurance benefits to our membership or by denying health insurance benefits to an employee because he is not one of our members, or by maintaining or hereafter executing a pension agreement limiting benefits to our membership.

WE WILL NOT in any manner restrain or coerce employees of the above-named Company in the exercise of the rights guaranteed under Section 7 of the Act, including the right to refrain from engaging in any or all of the activities guaranteed thereunder.

WE WILL jointly and severally with the above-named Company make James Bailey whole for any losses suffered by him because of not receiving health insurance benefits.

LOCAL 12009, UNITED MINE WORKERS
OF AMERICA, REGION 40,
Labor Organization.

Dated----- By-----
(Representative) (Title)

DISTRICT NO. 50, UNITED MINE
WORKERS OF AMERICA,
Labor Organization.

Dated----- By-----
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding against Indiana Gas & Chemical Corporation, herein also called the Company or the Respondent Company, and Local 12009, United Mine Workers of America, Region 40,¹ herein also called the Local Union, and District No. 50, United Mine Workers of America, herein also called the District Union or the Unions or the Respondent Unions when referred to together, was initiated by James L. Watkins, an individual. The hearing was conducted on February 16 and 17, 1960, at Terre Haute, Indiana. The parties presented oral argument and also filed briefs.

Upon the entire record in the case and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Respondent Company, an Indiana corporation, is engaged at Terre Haute, Indiana, in the manufacture and sale of metallurgical coke and coal chemicals.

¹ The caption of the complaint in its present form has been corrected to conform to the proof adduced at the hearing. In its original form the complaint showed District 50 instead of Region 40.

During 1958, which is a representative period, the Company sold and shipped from its plant directly to points outside the State of Indiana, goods valued in excess of \$50,000. It is found that the Respondent Company is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Local Union, Local 12009, United Mine Workers of America, Region 40, and the District Union, District No. 50, United Mine Workers of America, are labor organizations within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

The issues presented by the pleadings are whether the Company and the Unions violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2), respectively, by (1) entering into, maintaining, and enforcing a collective-bargaining agreement of November 1, 1958, covering all the Company's employees, which provides that the Company shall furnish certain hospital, surgical, and medical insurance coverage for only its employees who are members of the Local Union and their families; (2) entering into and maintaining a pension agreement of November 1, 1958, covering all the Company's employees which provides that the Company shall make payments to a pension fund based upon the number of hours worked by all the employees, but establishes a pension plan only for employees who are members in good standing of the Local Union; (3) refusing under the collective-bargaining agreement employee James Bailey insurance coverage on April 17, 1959, because he was not a member of the Local Union; and (4) discharging James L. Watkins because he was not a member of, and to prevent trouble with, the Union.

B. *The contracts and their application*

The bargaining contract between the Company and the Unions (referred to by the signatories as a wage agreement) was entered into and became effective beginning November 1, 1958, and was for a term of 1 year and thereafter from year to year, subject to termination upon 60 days' notice preceding any anniversary date. The contract does not define the term employee as used therein or set forth a formal unit description, but lists in an appendix the classifications and their respective rates of pay which were bargained for. Among others it contains the following provisions which are here set forth with emphasis added:

Article IX

Sick Benefits

Section 3

[In pertinent part:]

The Company shall provide Hospital, Surgical and Medical Coverage for each member of the Union, and his immediate family,—such member being in good standing with the Company, in accord with Blue Cross and Blue Shield comprehensive policies,—

Article V

Pensions

The Company shall deliver and pay over to a corporate trustee which shall be jointly named and contracted with by the Union and the Company, a copy of which contract being attached hereto as "Exhibit C" and become a part hereof, an amount or sum of money equal to ten and one quarter (10.25) cents per hour on all hours worked during the previous calendar month, by all persons employed in the bargaining unit as defined herein, as a Pension Fund.

Article XII

Section 1

The Company agrees that the sole bargaining power for wages, rates of pay, hours of work and other conditions of employment, for all employees who are or shall become members of the Gas and By-Product Coke Workers Local No. 12009, District No. 50, United Mine Workers of America, is vested exclusively in the Union through its duly elected or appointed officers or committees.

The agreement does not contain a provision requiring union membership as a condition of employment.

The Pension Agreement between the Company and the Unions originally entered into July 1, 1952, as amended on November 1, 1958, among other things, contains the following provisions which are here set forth with emphasis added:

Purpose

It is the purpose and intent of this Agreement to effectuate those portions of the Wage Agreement entered into by and between the Union and the Company dated as of July 1, 1952, to provide a pension plan, as hereinafter set forth, for the employees of the Company, who are members in good standing of the Union in accordance with the Rules of District 50, United Mine Workers of America, and to establish a trust fund to be known as the pension fund, to the extent hereinafter set fourth, to be used exclusively for the benefit of such employees upon the following terms and conditions:

Article I

Definition

Section I. The term "Employee" as used in this Agreement shall include all Employees of the Company who are members of the Union, and especially excludes all Employees not covered by the terms of the Wage Agreement by and between the Union and the Company.

Article II

Payment to Pension Fund

[In pertinent part:]

Section I. The Company will deliver and pay over to such corporate trustee, as may be named, under the terms of the Wage Agreement, an amount or sum of money equal to six cents (6¢) per hour on all hours worked during the previous calendar month by all persons employed in the bargaining unit as defined in the wage agreement;

The bargaining agreement remained in force until November 1, 1959, when another agreement became effective. The Pension Plan Agreement was amended on December 14, 1959, and superseded the earlier agreement. These new agreements do not contain the provisions recited above limiting the benefits involved to members of the Local Union. The new agreements do not contain changes in other respects which are significant to this proceeding.²

It is therefore found that the Company and the Unions provided by contract for a period of at least 1 year beginning November 1, 1958, for hospital, surgical, and medical insurance coverage limited to members of the Local Union, and for a pension fund to which the Company was required to contribute on the basis of all persons employed who were subject to the collective-bargaining agreement although benefits were to be limited to members in good standing of the Local Union. As the original charge against the Company alleging a violation of Section 8(a)(1) and (3) was not filed and served until July 21, 1959, the original charge against the Local Union alleging a violation of Section 8(b)(1) and (2) was not filed and served until July 30, 1959, and as the original charge against the District Union alleging a violation of Section 8(b)(1) and (2) was not filed and served until September 17, 1959, the execution of the agreements on November 1, 1958, under Section 10(b) is beyond the reach of the Board's authority and no finding of unfair labor practices will be made in this respect. As these contracts between the Company and the Unions governing the daily employment relationship were in effect until at least November 1, 1959, and hence were of a continuing nature, and as these contracts on their face show an illegality, findings of unfair labor practices may be based upon the maintenance and/or enforcement of these contracts but should be limited to the period

² Contrary to the position of the Company, the current agreements do not render moot the questions presented by the earlier agreements. See *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563.

The General Counsel contends that the defects of the prior agreements were not cured by the current agreement as the latter does not set forth a bargaining unit. Without passing upon the legal significance of this contention, inasmuch as the current agreement sets forth in an appendix a listing of the classifications and their respective rates of pay which were bargained for, it is found to constitute a sufficient unit description.

in the Company's case beginning January 20, 1959, in the Local Union's case beginning January 29, 1959, and in the District Union's case beginning March 16, 1959, all ending with the expiration of these contracts about November 1, 1959.³

The record discloses the following concerning the operations under these contracts. Edward Kelly, an employee of the Company of many years' standing, among other duties, makes out accident reports, sees to it that injured employees get medical and hospital attention, checks employees by visiting them when they are off from work due to illness or injury, and takes care of the insurance at the plant in all its facets, including disability, group life, and the medical and hospital insurance involved in this proceeding. Kelly also does some personnel work in connection with the hiring of the employees.⁴

New men employed by the Company have a probation period of 30 working days after which they are eligible for the insurance and membership in the Local Union. To use Kelly's words, ". . . if he's the man they want, why, both the organization and the company, they accept the man, and he's an employee." After Kelly checks with the timekeeper as to whether he has on file a union dues checkoff authorization card from a particular man, Kelly has the man involved bring in certain required information concerning his insurance such as date of birth and matters relating to his family, and then arranges for coverage. Kelly testified that he did not always check with the timekeeper regarding the union authorizations, but only did so occasionally in order to find out if a man was still working for the Company. It is observed that the form authorization in evidence as part of the bargaining agreement makes no provision for showing whether an individual has left the Company's employ. There have been occasions when Kelly received authorization cards from Alva Fagg, secretary of the Local Union, and Kelly passed them along to the timekeeper. According to Kelly, when he receives an authorization card he knows that the individual has worked with the Company long enough to have completed his probation, and he then checks to see if the individual has been covered by the insurance.

Kelly also testified that it was not necessary for an employee to have executed an authorization card in order to obtain the insurance coverage. Kelly gave as examples of persons covered by the insurance prior to the execution of authorization cards, James Watkins, James Grissom, James Bailey, and Billy Irwin. It also appears that Watkins was employed on December 20, 1958, and received the insurance on March 1, 1959; Grissom was employed on February 20, 1959, and received the insurance on May 1, 1959; Bailey was employed on January 29, 1959, and received the insurance on May 1, 1959; and Irwin was employed on January 6, 1959, and received the insurance on April 1, 1959. Kelly stated that there were a few instances of an employee's failing to get insurance coverage, but that as soon as that was realized the situation was corrected.

James Bailey, who is alleged to have been discriminatorily denied health insurance benefits, was in the hospital in 1959. Between April 18 and 21, Kelly visited Bailey and inquired about his condition. On this occasion Kelly asked Bailey whether he had been contacted about joining the Local Union and Bailey replied that he had not been asked to join. Kelly stated to Bailey that he was not covered by Blue Cross because that insurance was given to the employees under the contract with the Local Union.⁵ Bailey, as already found, was employed on January 29, 1959, and was not afforded insurance coverage until May 1, 1959. Bailey joined the Local Union in the latter part of April or early May and his monthly dues were first checked off on July 4.

There is no contention that the pension fund agreement was enforced, as distinguished from being maintained, and the record shows that the Company made contributions to the pension fund pursuant to the agreement for each employee immediately after the employee completed his probation period regardless of whether he was a union member.

It is accordingly found within the limitations of Section 10(b) given above that the Respondent Company and the Respondent Unions maintained the pension agreement, maintained and enforced the health insurance provisions of their bargaining

³ See *Local Lodge 1424, etc. v. N.L.R.B. (Bryan Manufacturing Co.)*, 362 U.S. 411; and *The Radio Officers' Union, etc. v. N.L.R.B.*, 347 U.S. 17, 34. The parties do not urge the limitations of Section 10(b) in this aspect of the case.

⁴ At first Kelly testified when examined by the General Counsel that he had never had any title other than bookkeeper, and after he was confronted with his prior statement he testified that he was personnel manager when he executed the statement in October 1959.

⁵ These findings are based upon Bailey's credible testimony. Kelly, whose duties included visiting ill or injured employees, did not impress the Trial Examiner favorably as a witness, and his testimony that he had not seen Bailey at the hospital is not credited.

agreement, and discriminated against James Bailey in April 1959, by denying him health insurance benefits because he was not a member of the Local Union, in violation of Section 8(a)(1) and (3), and Section 8(b)(1)(A) and (2) of the Act.⁶

C. James L. Watkins

The General Counsel alleges that Watkins, who had been employed on December 19, 1958, was discriminatorily discharged in violation of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act. The Company and the Unions take the position that Watkins was discharged for good cause and that the discharge was not brought about by any conduct on the part of the Unions.

As Watkins was discharged on March 6, 1959, and the original charge against the District Union alleging a violation of Section 8(b)(1)(A) and (2), was not filed and served until September 17, 1959, more than 6 months subsequent to the discharge, it will be recommended under Section 10(b) that the complaint against the District Union regarding Watkins be dismissed.⁷

In support of the defense that Watkins was discharged for good cause, the Company relies upon an incident which occurred in the lockerroom before work the morning of Watkins' discharge on March 6, when Watkins engaged in an argument with a fellow employee and further upon the position that it did not know the subject of the argument at the time of the discharge.⁸

On the occasion involved, Watkins, who was not a member of the Local Union, had a discussion in the lockerroom before working time in the presence of a number of other employees with fellow employee Flaud Long, who was a member but not an officer of the Local Union. It was not uncommon for employees to hold discussions in the lockerroom and while there were raised voices and the discussion was described as "pretty heated" it does not appear that anything untoward occurred. Watkins, who had expressed his views about the Unions before, supported, and Long opposed, the Indiana right-to-work law. After Long determined from Watkins that Watkins was not a member of the Local Union, Long declared that Watkins would have to join or Watkins would not be working for the Company. Watkins replied that he would join the Local Union when he was offered the same membership rights which Long had.⁹ About midmorning, Alva Fagg, secretary, according to Watkins' credible testimony, told Watkins to give Mark Myers, treasurer of the Local Union, \$8 for dues and fees. About 2 p.m. Foreman Larkin Bailey informed Watkins that he was laid off due to a reduction in force. Watkins left the plant shortly thereafter.

Management officials testified that they could not recall who among the foremen reported the incident of the morning of March 6. However, the record supports the Company's position that it discharged Watkins for engaging in the argument on the morning of his discharge and that it did not know the subject matter of the argument.¹⁰

⁶ See *Rockaway News Supply Company Inc. (Newspaper and Mail Delivers' Union of New York and Vicinity)*, 94 NLRB 1056, 1059; *Carty Heating Corporation and Mechanical Contractors Association of New York, Inc.*, 117 NLRB 1417, 1418; and *Northeast Coastal, Inc.*, 124 NLRB 441.

⁷ This matter was not raised by the District Union.

⁸ The following are other elements which constitute the good cause relied upon by the Company to explain Watkins' discharge: (1) Poor attitude toward his job, belligerent and argumentative, did not get along with either the foremen or his fellow employees, and was a troublemaker; (2) absence without excuse on February 1, 1959; (3) late for work March 5, 1959; (4) walked off the job when a machine became difficult to operate; (5) unsatisfactory work; and (6) refused to obey a foreman's order. It is unnecessary to pass upon the validity of these assertions.

⁹ The Unions take the position that they have a nondiscrimination policy regarding creed, color, and nationality. Whether there is any basis for the belief Watkins expressed to Long on this score is of no consequence to this proceeding.

¹⁰ The General Counsel adduced testimony by Harold Gordon that in August 1959 he saw a report by Foreman Melvin Prater showing that Watkins was discharged, among other reasons, because Prater anticipated trouble in view of Watkins' opinion of the Local Union and further that Prater thereafter destroyed a paper which may have been the same report. Later in the hearing it appeared that the General Counsel had had in his possession but had not shown to Gordon a report purportedly executed by Prater dated March 11, 1959, which does not mention the Local Union. Since Gordon did not testify concerning the report dated March 11, the Trial Examiner cannot find that the report Gordon testified he saw in August was not the same report of March 11, nor can the Trial Examiner find that Gordon's recollection is accurate concerning the contents of the report which he testified he saw in August. Under these circumstances no weight is attached to Gordon's testimony in this respect.

In espousing his views during the course of this argument in favor of the Indiana right-to-work law and his opposition to joining the Local Union, Watkins was exercising a right protected under Section 7, to refrain from and possibly to influence others to refrain from joining a labor organization. Watkins' discharge resulted from engaging in this argument. Whether the Company knew of, or intended to discharge Watkins for espousing, these views is immaterial. Rights under Section 7 are not determined by such variables as knowledge and intent but by an appraisal of the conduct involved and the terms of the statute itself. As the Court of Appeals for the Third Circuit declared in *Cusano d/b/a American Shuffleboard Co. v. N.L.R.B.*,¹¹

It is true that an employer may discharge an employee for a good reason, a bad reason, or for no reason at all. . . . This rule, however, is necessarily limited where an employee is engaging in activities protected by the Act. . . . To adopt petitioner's view would materially weaken the guarantees of the Act, for the extent of employees' protected rights would be made to vary with the state of the employer's mind. We conclude that if the conduct giving rise to the employer's mistaken belief is itself protected activity, then the employer's erroneous observations cannot justify the discharge.

It is accordingly found that the Company discharged James L. Watkins on March 6, 1959, in violation of Section 8(a)(1) and (3) of the Act.

Officials of the Company and the Unions supported each other in their testimony to the effect that the Unions had nothing to do with Watkins' discharge. The Unions and the Company have had a relationship for 20 to 25 years. The bargaining agreement in force at the time of the events does not contain a provision making membership in the Unions a condition of employment. Although it may be inferred that the Local Union was desirous of having as many members as possible, as would any organization, and also that the Company was aware of this desire, as any employer would have been, there is no showing on this record of any conduct on the part of the Local Union which would bring about Watkins' discharge nor any showing that the Company discharged Watkins because he was not a member of, or to prevent trouble with, the Local Union.¹² It will therefore be recommended that the complaint against the Local Union regarding Watkins be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent Company and the Respondent Unions set forth in section III, above, occurring in connection with the operations of the Respondent Company 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.

V. THE REMEDY

Having found that the Respondent Company and the Respondent Unions have engaged in unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Thus, it having been found that the Respondent Company and the Respondent Unions violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2), respectively, by maintaining a pension agreement which provides for benefits to members of the Respondent Unions only, by maintaining and enforcing a bargaining agreement providing for health insurance for members of the Respondent Unions only, and denying to James Bailey health insurance benefits in April 1959, because he was not a member of the Local Union, it will be recommended that the Respondent Company and the Respondent Unions cease and desist from engaging in this conduct and also that they jointly and severally make Bailey whole for such loss as he suffered by reason of not receiving health insurance benefits, by payment to him of a sum of money equal to the amount of insurance benefits he would have received but for the discriminatory denial of health insurance coverage.

¹¹ 190 F. 2d 898, 902-903 (C.A. 3). See also, *Salt River Valley Water Users' Association v. N.L.R.B.*, 206 F. 2d 325, 329, where the Court of Appeals for the Ninth Circuit observed, "That the [employer] may have acted in good faith believing itself justified in discharging [the employee] is not material where the activity for which he was discharged was actually protected by the Act."

¹² Cf. *Insulation Contractors of Southern California, Inc., etc.*, 110 NLRB 638.

It having also been found that the Respondent Company discriminated with regard to the hire and tenure of employment of James L. Watkins on March 6, 1959, it will be recommended that the Respondent Company offer Watkins immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay suffered as a result of the discrimination against him, by payment to him of a sum of money equal to the amount he would have earned from the date of the discrimination against him to the date of the offer of reinstatement less net earnings to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289. Earnings in any one quarter shall have no effect upon the backpay liability for any other such period. It will also be recommended that the Respondent Company preserve and make available to the Board, upon request, payroll and other records to facilitate the computation of the backpay due.

As the unfair labor practices committed by the Respondent Company and the Respondent Unions are of a character striking at the root of employee rights safeguarded by the Act, it will be recommended that they cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

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

CONCLUSIONS OF LAW

1. The Respondent Unions, Local 12009, United Mine Workers of America, Region 40, and District No. 50, United Mine Workers of America, are labor organizations within the meaning of the Act.

2. The Respondent Unions have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

3. The Respondent Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

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

5. The Respondent Unions have not engaged in violations of the Act with regard to James L. Watkins as alleged.

[Recommendations omitted from publication.]

Schick Incorporated and United Steelworkers of America, AFL-CIO and District No. 98, International Association of Machinists, AFL-CIO, Petitioners. *Cases Nos. 4-RC-4381 and 4-RC-4404. March 22, 1961*

DECISION, ORDER, AND DIRECTION OF ELECTIONS

Upon petitions duly filed in Cases Nos. 4-RC-4381 and 4-RC-4404 under Section 9(c) of the National Labor Relations Act, a consolidated hearing was held before Chester S. Montgomery, hearing officer, and the proceeding was thereafter transferred to the Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in these cases, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.¹

¹The Petitioner in Case No. 4-RC-4381 is referred to herein as Steelworkers, and the Petitioner in Case No. 4-RC-4404 is referred to as IAM. International Brotherhood of 130 NLRB No. 155.