

In the Matter of A. S. POLAN, L. M. POLAN, C. M. POLAN, LAKE POLAN, JR., AND E. J. POLAN, A PARTNERSHIP, DOING BUSINESS UNDER THE FIRM NAME OF ZENITH OPTICAL COMPANY¹ and OPTICAL WORKERS COORDINATING COMMITTEE, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS

Case No. 9-C-1809.—Decided October 30, 1943

DECISION
AND
ORDER

On September 14, 1943, the Trial Examiner 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 from the unfair labor practices found and take certain affirmative action, as set forth in the copy of the Intermediate Report annexed hereto, and that the complaint be dismissed as to the remaining allegations. Thereafter the respondents filed exceptions to the Intermediate Report and requested oral argument before the Board in Washington, D. C. On October 14, 1943, the respondents and the Union participated in oral argument before the Board. The Board has considered the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondents' exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

The Trial Examiner found, and we agree, that the respondents discriminatorily discharged 11 named employees. In making this finding, we attach considerable weight to the anti-union statements and conduct of the respondents commencing prior to and continuing throughout the period of the discharges. Thus, in January 1943, prior to the discharge of Eckley, Foreman Dent inquired of employee Stein "how the union was coming along," Foreman D'Ammato charged employee Poling with being a "ringleader" of the union movement, and Foreman King, while agreeing with Poling that employees could

¹ As amended at the hearing.

not be discharged for joining the Union, asserted "there are always other reasons." On January 25, prior to the discharges of Kidd and Johnson, Foreman Chedester and Grieg discussed the dismissal of Johnson because of his success in organizing the employees. On February 5, the date of Smallwood's discharge, Foreman Kinder warned him, "If you don't get some of those ideas out of your head you won't last long" and also stated that the Union would never get a footing in the respondents' plants. A few days later, Foreman Perry, in a conversation with Smallwood, disparaged and belittled the Union. Following Carney's strongly anti-union speech on February 9 and Albert Polan's threat on that day to beat up representatives of the Union who were passing out handbills, employees Stein and Poling were discharged on February 12 and 15, respectively. On February 20, Foreman Sweitzer tore a union leaflet and threw the pieces at employee Peyton, saying, "That's what I think of you and your damned union." Commencing on February 22, employees Peyton, Rudman, Baker, Pribble, and Black were discharged in rapid succession.

We also attach importance to the failure of the respondents, with respect to the employees named in the complaint, to adhere to their policy of granting a hearing to employees before their discharge. In addition, we deem it significant that, with respect to the discharge of Kidd, Lenertz, the respondents' acting personnel director, stated to Kidd, after his discharge, that the respondents did not rehire employees who had previously been discharged by them, while the uncontroverted testimony shows that the respondents rehired employee Smallwood after he had been discharged by them, and, with respect to the discharge of Black, that Moore, who investigated one of Black's absences on behalf of the respondents, was the mother-in-law of L. M. Polan, and that, although Moore conducted her investigation on March 5, 1943, Black was not advised that she was to be discharged until March 22, 1943.²

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, A. S. Polan, L. M. Polan, C. M. Polan, Lake Polan, Jr., and E. J. Polan, a partnership, doing business under the firm name of Zenith Optical Company, Huntington, West Virginia, and their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Optical Workers Coordinating Committee, affiliated with the Congress of Industrial Organizations,

² It is noted that the reference in Albert Polan's testimony (at page 16 of the Intermediate Report) to an employee with "only one hand" is to Gobel Osborne.

or in any other labor organization of their employees, by discharging or refusing to reinstate any of their employees, or by discriminating in any other manner with regard to their hire or tenure of employment or any term or condition of their employment;

(b) 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 Act.

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

(a) Offer Gaylord Kidd, Edgar L. Johnson, Marguerite Stein, Madeline Peyton, Fred Allen Rudman, Louise Baker, Hugh T. Pribble, and Thelma Black immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;

(b) Make whole Gaylord Kidd, Edgar L. Johnson, Marguerite Stein, Madeline Peyton, Fred Allen Rudman, Louise Baker, Hugh T. Pribble, and Thelma Black for any loss of pay they have suffered by reason of the respondents' discrimination against them, by payment to each of them of a sum of money equal to the amount which he or she normally would have earned as wages from the date of his or her discharge to the date of the respondents' offer of reinstatement, less his or her net earnings during said period; and make whole Buell Smallwood for any loss of pay he has suffered by reason of the respondents' discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned as wages from the date of his discharge to the date upon which he secured the job he held at the time of the hearing, less his net earnings during such period;

(c) Upon application by Doreene Eckley and Glen Poling, within 40 days after their discharge from the armed forces of the United States, offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;

(d) Make whole Doreene Eckley and Glen Poling for any loss of pay they have suffered or may suffer by reason of the respondents' discrimination against them, by immediate payment to each of them of a sum of money, equal to the amount which he or she normally would have earned as wages from the date of his or her discharge to the date of his or her entry into the armed forces, less his or her net earnings during said period, and by payment to each of them of a sum of money equal to the amount which he or she normally would

earn as wages from a date 5 days after his or her timely application for reinstatement to the date of the respondents' offer of reinstatement, less his or her net earnings during said period;

(e) Post immediately in conspicuous places throughout their plants at Huntington, West Virginia, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to their employees stating: (1) that the respondents will not engage in the conduct from which they are ordered to cease and desist in paragraphs 1 (a) and (b) of this Order; (2) that the respondents will take the affirmative action set forth in paragraphs 2 (a), (b), (c), and (d) of this Order; and (3) that the respondents' employees are free to become and remain members of Optical Workers Coordinating Committee, affiliated with the Congress of Industrial Organizations, and that the respondents will not discriminate against any employee because of his membership or activity in that organization;

(f) Notify the Regional Director for the Ninth Region in writing, within ten (10) days from the date of this Order, what steps the respondents have taken to comply herewith.

AND IT IS FURTHER ORDERED that the complaint, insofar as it alleges the discriminatory discharge of Wade Wilson, be, and it hereby is, dismissed.

MR. GERARD D. REILLY took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT

Mr. Benjamin E. Cook, for the Board.

Mr. Edmund A. Marshall, of *Fitzpatrick, Strickling & Marshall*, of Huntington, W. Va. for the respondent.

Mr. B. T. Hank Wolford, of Huntington, W. Va., for the Union.

STATEMENT OF THE CASE

Upon a first amended charge duly filed on June 28, 1943, by Optical Workers Coordinating Committee, affiliated with the Congress of Industrial Organizations, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Ninth Region (Cincinnati, Ohio), issued its complaint dated July 17, 1943, against A. S. Polan, L. M. Polan, C. M. Polan, Lake Polan, Jr., and E. J. Polan, a partnership, doing business under the firm name of Zenith Optical Company, individually and collectively herein called the respondents, alleging that the respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and notice of hearing thereon were duly served upon the respondents and the Union.

With respect to the unfair labor practices, the complaint alleged in substance: (1) that since January 1, 1943, the respondents interfered with, restrained,

and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act in that they (a) urged, persuaded, and warned their employees from becoming or remaining members of the Union; (b) questioned their employees as to their union affiliations; (c) threatened their employees with loss of employment and other reprisals if they became or remained members of the Union; (d) maintained a close surveillance of, and spied upon the activities, meetings, and meeting places of the Union and its membership; (e) vilified and disparaged the Union, its leaders and organizers; (f) requested, urged and ordered their employees to attend a meeting held on or about February 9, 1943, at which the speaker denounced unions and attempted to influence said employees to refrain from becoming or remaining members of the Union; and (g) closed their plant in order to coerce their employees into attending the meeting; and (2) discharged or laid off the following named persons, on or about the date appearing opposite their respective names and thereafter failed and refused to reinstate them, because they and each of them joined and assisted the Union and engaged in concerted activities with other employees for the purpose of collective bargaining or other mutual aid or protection: Gaylord Kidd, January 26, 1943; Edgar L. Johnson, January 27, 1943; Richard Allison, February 8, 1943; June Callicott, February 10, 1943; Doreene Eckley, February 10, 1943; Glen Poling, February 12, 1943; Marguerite Stein, February 12, 1943; Madeline Peyton, February 22, 1943; Fred Allen Rudman, February 28, 1943; Louise Baker, March 3, 1943; H. T. Pribble, March 3, 1943; Thelma Black, March 15, 1943; Buell Smallwood, February 5, 1943; Wade Wilson, June 15, 1943.¹ ◊

Pursuant to notice, a hearing was held at Huntington, West Virginia, from August 2, to 6, 1943, before Gustaf B. Erickson, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondents were represented by counsel and the Union by an authorized representative. All of the parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues.

At the commencement of the hearing the undersigned granted without objection a motion of counsel for the respondents that his oral denial of each and every allegation of the complaint stand as respondents' answer to the complaint. The undersigned also granted without objection motions made by counsel for the Board to amend the title of the complaint and to add to paragraph 6 thereof the names of Mrs. Thelma Black, Buell Smallwood, and Wade Wilson. At the close of the Board's case the undersigned granted a motion of counsel for the Board to dismiss from the complaint the names of Richard Allison and June Callicott, and denied a motion made by counsel for the respondents that the complaint be dismissed. The respondents' motion to dismiss was renewed at the close of the hearing. Ruling thereon was deferred. The motion is now denied. Thereafter the undersigned granted a motion of counsel for the Board to conform the pleadings to the proof. At the close of the hearing the parties were afforded an opportunity to argue orally before and to file briefs with the undersigned. No oral arguments were made and no briefs have been filed.

¹The last 3 names and dates were added to paragraph 6 of the complaint by amendment made at the hearing. The name of James Smith was also sought to be included in this amendment. On objection by counsel for the respondents who claimed surprise as to Smith, the undersigned ruled that with respect to Smith the respondent should be allowed the customary 10 days notice. The Board withdrew Smith's name from the proposed amendment

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The respondents A. S. Polan, L. M. Polan, C. M. Polan, Lake Polan, Jr., and E. J. Polan, a partnership doing business under the firm name of Zenith Optical Company, have their principal office and place of business in Huntington, West Virginia, where the partnership is engaged in the processing of glass for gunpowder and gun-control instruments. During the last year the partnership business exceeded \$500,000 in value. It has contracts with the United States Government and delivers about 50 percent of its products to government ordnance depots located in Pennsylvania and Illinois. The balance of the processed glass is delivered to the Minneapolis Honeywell Company in Minnesota under contract with the latter company, which purchases the processed glass from the respondents for use in performance of contracts it has with the Government. The Government furnishes all of the glass² and owns about 95 percent of all of the machinery and equipment, the respondents holding title thereto as agents of the Government. The respondents purchase for their own account all necessary processing materials such as felt for beveling, serum for polishing, various types of pulls and weights for blocking and polishing, cheese cloth, and alcohol. A substantial amount of such material is shipped to the respondents' plant in West Virginia from points outside that State. The premises are leased by the respondents from the owner of the property; the respondents exercise full managerial functions and complete supervision and supervisory authority over their employees, except that the plant guards are militarized. The undersigned finds that the respondents are engaged in commerce within the meaning of the Act.³

II. THE ORGANIZATION INVOLVED

Optical Workers Coordinating Committee, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondents.

III. THE UNFAIR LABOR PRACTICES

A. *Interference, restraint and coercion*

In August 1942, the Union began a campaign to organize the employees of the respondents. From the beginning of the campaign the respondents concerned themselves with the Union's activities. Employee Wade Wilson⁴ testified that soon after he was employed in August 1942, his foreman, James Scales, accused him of "talking union" and said that he had been so told by Russell Carte, captain of the respondents' plant guards; and that on several occasions Scales told him that any man who joined the Union should find himself another job. Scales testified that he "never discussed the union with anyone," and never considered the Union at all in his dealings with Wilson. Wilson was a credible witness. Scales impressed the undersigned as evasive. The undersigned finds

² Excess spoilage must be replaced by the respondents at their expense.

³ The Board so found in the *Matter of Zenith Optical Co.*, 48 N. L. R. B. 1283.

⁴ Erroneously named in the transcript as Wilham Wilson.

that Scales made the statements attributed to him by Wilson. By December of that year the Union's organizing campaign was in full progress.

On February 9, 1943, the employees were told by their respective foremen that they should attend a meeting scheduled for that afternoon in the City Hall at Huntington. The plant was closed for a period of about 2 hours and 15 minutes to enable all of the employees to attend and they were paid by the respondents for the time so spent. The meeting was attended also by some of the respondents, their superintendents and foremen and was addressed by R. W. Carney, a lecturer and business man of Wichita, Kansas. Although the meeting was ostensibly called for the purpose of increasing the production of war materials, the speaker dwelt also on the question of union organization in war plants. Louise Baker, a credible witness for the Board, testified without denial, and the undersigned finds that Carney "talked about the war; about what we should do to speed up production . . . Mr. Carney went on to say that 'unions were just like [a] tub, that they wouldn't hold water. He said anyone trying to organize a [union in a] defense plant should be stood up against a wall and shot. He said unions wouldn't offer you job security.'" Although a number of the respondents and some of their supervisory staff were present when Carney made the above quoted anti-union remarks, they did not disavow his remarks, nor did they ever inform their employees that Carney's speech did not represent their viewpoint.⁵

The respondents contend that they should not be held accountable for Carney's speech because he had been recommended to them by members of local dinner clubs⁶ as a speaker of wide reputation whose influence would increase the production of the plant. On the basis of the uncontroverted testimony as set out above this contention is clearly without merit. The respondents' utilization of Carney and their failure to disavow his anti-union utterances, constituted unfair labor practices. An employer is responsible under the Act for anti-union actions prosecuted with its assistance by other persons or agencies in the community even though such persons or agencies have no direct pecuniary interest in the employer's business.⁷ As found above, the respondents have never disavowed the speech, nor have they taken any other step to inform their employees that the speech and its implications were not sponsored and approved by the respondents. On the contrary the plant was closed and the employees who were told to attend by their supervisors were paid while attending the meeting. It is therefore clear that the speech was intended by the respondents to discourage union affiliation by their employees and the undersigned so finds.

Later on the afternoon of February 9, representatives of the Union distributed handbills in front of the plant stating that the plant and war production had stopped for a period of approximately 2¼ hours, supposedly for the purpose of permitting the employees to hear a speech on production but instead "you employees were made to sit and listen to a man who is a 'paid speech maker,' used by companies to defeat the aims of your Union." The leaflet also called attention to the number of man hours "wasted," and appealed to the employees to join the Union.

Harold Dameron, a field representative for the Union, testified that as he was giving out the leaflets that day in front of the plant, he was approached by Albert Polan, one of the respondents herein, and four other people.⁸ He

⁵ Carney received no compensation from the respondents

⁶ The record discloses that Carney was brought to Huntington at the instance of the local Lions and Foremans Managers Clubs.

⁷ See *Matter of Manville Jenckes Corporation* 30 N L R. B. 382.

⁸ Dameron testified that he assumed that the four people with Polan were office workers because he had seen them at times entering and leaving the plant in street clothes as distinguished from the work clothes worn by the production employees.

handed a leaflet to Polan who jerked it from Damaron's hand and then walked over to the curb. There Polan said to the four who were with him, "which one of the sons-o-bitches do you want to kick the hell out of." Charles Spurlock, who assisted Damaron in the distribution of the leaflet corroborated the testimony of Damaron and testified further that Polan then said, "I will take the fat one," referring to Denis Jades who was also distributing the leaflets, and that one of the four persons who were with Polan said, "I will take the little one" referring to Spurlock. No altercation, however, resulted from the incident. Polan denied the statements attributed to him by Damaron and Spurlock and testified that it is not his fashion to express himself in the manner testified to by Damaron and Spurlock; that he can say things just as "nasty, but I don't cage it in those terms. It is a certainty that on that occasion, or on any occasion, I made no such statement." The undersigned rejects his denial and finds that the incident occurred substantially as testified by Damaron and Spurlock.

Madeline Peyton, a credible witness testified without denial that about February 20, 1943, she handed a union leaflet to her foreman George Sweitzer, as he was leaving the plant. He read it, tore it up and threw the bits at her saying "That's what I think of you and your damned union."

James Smith⁹ testified that sometime prior to May 14, 1943, his foreman Scales, told him that Carte had sent him to Smith to inquire if Smith had joined the Union and "did I have any cards." Although Smith had joined the Union he told Scales that he had not because, as he testified, "I knew I would be discharged if I had." Although Scales did not specifically deny his conversation with Smith, he did testify, as set forth above, that he never discussed the Union with anyone. Smith was a credible witness and the undersigned accepts his testimony as true.

Upon the basis of the credible evidence set out above, the undersigned finds that the respondents interfered with, restrained and coerced their employees in the exercise of the rights guaranteed them in Section 7 of the Act.

B. *The discharges; further interference, restraint and coercion*

The complaint as amended, alleges that the respondents on various dates discharged and thereafter refused to reinstate Gaylord Kidd, Edgar L. Johnson, Buell Smallwood, Doreene Eckley, Glen Poling, Marguerite Stein, Madeline Peyton, Fred Allen Rudman, Louise Baker, H. T. Pribble, Thelma Black and Wade Wilson, because they joined and assisted the Union, and engaged in concerted activities with other employees for the purposes of collective bargaining or other mutual aid or protection.

The respondents' personnel policy, especially as it concerns the discharge procedure is of great significance in determining the merit of the respondents' contentions with respect to the discharges alleged by the Board to be discriminatory.

Employees are originally hired by the respondents' personnel department, subject to the approval of the department supervisors, on a 90-day temporary basis, after which they become permanent employees. During the temporary period they undergo training for the job to which they are assigned and enjoy the rights and privileges of permanent employees.¹⁰ It is the customary and general policy of the respondents, according to the testimony of Ellen Lenertz, respondents' assistant personnel officer, that before discharging an employee, the

⁹ See footnote 1, *supra*.

¹⁰ They do not however enjoy group insurance benefits until they become permanent employees.

discharging officer, who is usually the foreman, discusses with the employee the fact that he is about to be discharged, during which conference the employee is permitted to bring to his attention any facts regarding his work, and the possibility of employment in a different job. If the employee is denied a hearing by the discharging officer, or feels that he has not been given a satisfactory hearing, he has the right to present his case to the personnel officer, who, after a hearing, often makes adjustments to the satisfaction of the employee.

*Doreene Eckley*¹¹ was first employed by the respondents in March 1942. Until June of that year she worked 3 hours per day, from 5:30 until 8:30 in the evening, and attended college in the daytime. From the beginning of her employment she operated a machine which polished to a certain precision, glass used for bomb sights. The respondent made no contention that her services and production were not good. From June until September she worked full 8-hour shifts, her shift being from 3:15 to 11:45 p. m. In September, she and two other employees, one of whom was Virginia Lee Crum, requested their foreman, John Ptzseck, for permission to work a shift from 2:00 to 10:00 p. m. each day to enable them to get a full night's sleep so that they could continue their college courses which commenced again about the middle of September. After consulting with management, Ptzseck told them that their requests had been granted and they commenced working those hours.

Eckley joined the Union in December 1942. She actively solicited memberships and according to her undisputed testimony "really organized the whole floor" she was on and had other employees helping her to organize other departments in the plant. It is reasonable in these circumstances, to infer that the respondents were aware of her union activities and sympathies.

About January 16, 1943, Ptzseck told Eckley and Crum that some of the girls in their department were complaining because they had to work from 3:15 to 11:45 p. m., whereas Eckley and Crum worked from 2:00 p. m. to 10:00 p. m., and for that reason the latter two would have to conform their hours to those of the regular shift if they wanted to keep their jobs. They told him they would think the matter over and let him know, and intimated to Ptzseck that if they must work the regular hours they would have to quit their jobs.

On January 17 they reported for work at 3:15 p. m. and worked until 11:45 p. m., the regular shift hours. On the following day they again reported at 3:15 p. m. During the course of that work day, Ptzseck suggested to them that they should write a note to management to the effect that if they were compelled to work the regular shift hours they would have to quit their jobs. They did so and gave the note to Ptzseck.¹²

On January 19, Eckley and Crum reported for work at 3:15 p. m. Attached to their time cards was a note stating that they "couldn't come back to work" and to report to the personnel office. They did so and were told by Personnel Officer Burr that their checks were ready and their services were no longer required because of the note they had sent to management on the previous day. They asked Burr for the right to work on the regular shift for another month at least, or until the following June. Burr refused their request.

¹¹ Eckley's testimony was by deposition taken by stipulation of the parties before Cornella S. Williams, a shorthand reporter and notary public for the County of Cabell, State of West Virginia, on July 27, 1943.

¹² The note was as follows:

We are going to school, and cannot work from 3:15 to 11:45 every night. The hours are too long and lowers our efficiency to work. We were working from 2:00 P. M. until 10:00 P. M. but these hours were changed, due to someone sending of complaints into the office. We find we will have to discontinue our work here if these hours are not changed.

The respondents contend that because of the complaints they received from girls in the department where Eckley was employed, production was disrupted, and that Eckley voluntarily quit her job when she was told that she would have to work the regular shift hours.

The facts do not support this contention. Admittedly Eckley was a good worker. There is no contention that her production lagged. When Ptzseck told her on January 16, that she could no longer work from 2:00 to 10:00 p.m., but would be required to work the regular shift hours, she obeyed him and reported for work, thereafter at 3:15 p. m. It was Ptzseck who suggested that she send the note to management, the sending of which resulted in her discharge. And when she reported to the personnel office she received no consideration in her plea for continued employment contrary to the announced policy of the respondents.

The facts convince the undersigned and he finds, that Ptzseck's suggestion to Eckley that she send the note of January 18 to management was a subterfuge and was calculated to maneuver Eckley into a position on the basis of which the respondents could contend that she voluntarily left their employment. It is clear however and the undersigned finds that the respondents' action with respect to Eckley constituted a discharge, the true motive of which was her union membership and activity.

Eckley enlisted in the Navy as a WAVE on or about July 28, 1943, and is now serving in the Armed Forces of the United States.

Gaylor Kidd was employed by the respondents on January 6, 1943, as a freight elevator operator. He joined the Union on or about January 10, and engaged in union activities to the extent of soliciting union memberships and attending its meetings. On one occasion, during his employment, he was given some Union membership cards by a fellow employee, in the presence of Foreman Rex Morris. Thereafter, Morris asked other employees the identity of Kidd. When he reported for work on January 25, he found that his time card was not in the rack. He asked the guard in charge for his card and was told by him to report to Miss Burr, respondents' personnel officer, the next morning at 9 o'clock. On his third unsuccessful attempt to see Burr on the 26th, he was told by one of the employees in her office that Burr would not see him, and that he should return the next day for his final pay. In the meantime, he talked to Carte, who in addition to being captain of the guards, was also directly in charge of maintenance employees and Kidd's foreman, and asked him for reemployment. Carte told him that if Kidd could "straighten it out with the office" he would re-employ him. Kidd went to the personnel office the next morning as instructed. There he told Ellen Lenertz of his conversation with Carte. She told him that she had been told by Carte that he had not sent Kidd to the office and that "the company didn't hire people they had discharged." She also told him that the reason for his discharge was "unnecessary talking." He received his pay and left.

Carte testified that at the time of his employment he instructed Kidd not to "leave the elevator and go into any department and talk to any employees," and that within a week he received complaints from departments that Kidd was violating those instructions which caused his discharge by Carte. He testified specifically to written reports received by him from Guard M. C. Wellman, dated January 18, Production Manager D. W. Harris dated January 20, and Guard L. R. Mays dated January 27. These reports alleged in substance, all of which was reiterated by the testimony of Wellman, Harris, and Mays, that Kidd was reckless in the operation of the elevator; that he did not stay on the job, causing delay in the moving of freight; and that he talked too much to the girls in the processing department on the fourth floor of the plant.

Carte further testified that sometime prior to January 20, he warned Kidd to correct his faults but thereafter never talked to him in that regard. Harris testified that he talked to Kidd two or three times, but never in formal conferences as was the policy of the respondents, because Kidd was not a "production employee, merely a service employee." Wellman testified that he talked to Kidd on different occasions about his alleged infractions and "he would seem to be all right at the time and when I left he would be reckless as ever again." Except for the written report made by Wellman on January 18, he never reported Kidd's alleged misconduct to any foreman. Mays testified that his written report of January 27, was made prior to Kidd's discharge and "I don't know if it was the cause of him being-discharged." When it is remembered that Kidd's time card was not in the rack on January 25 and that he has not worked since then, May's testimony casts doubt on the good faith of the respondents' contention. Foreman Marcus Dent testified that Kidd had a tendency to talk to girls, rather than run the elevator.

Kidd, a credible witness, testified that the elevator he operated carried blocks from the fourth to the fifth floor and that he seldom had a call from below the third floor. Since he had no special place to park the elevator, he remained on the fourth floor until he got a call to go elsewhere. He admitted that on occasions he would step just outside the elevator door and testified without denial that there was no rule of the plant against talking while on the job. He denied that he had ever been warned that he was "doing wrong."

The respondents made no attempt to explain the abrupt dismissal of Kidd without a hearing, nor did Lenertz, who well knew respondents' policy in that regard, give a reason for bluntly telling Kidd "the company didn't hire people they had discharged." Neither did the respondents offer a defense to the inference to be drawn from the fact that Foreman Morris sought the identity of Kidd at a time when the latter was receiving Union membership cards from a fellow employee. All of these items, when considered in the light of Carte's testimony that Kidd was discharged by him on the strength of the complaints received, one of which was made 2 days after Kidd's time card had been pulled from the rack, convinces the undersigned, and he finds, that Kidd was not discharged for inefficiency or violation of instructions.

The undersigned finds that the defense of the respondents fails and that as set forth in the complaint Kidd was discharged by the respondents on January 25, 1943, because he joined and assisted the Union.

Edgar L. Johnson was first employed by the respondents on January 17, 1943, as a helper to Alonzo Webb, a machine operator in the polishing department. His job was to keep water and rouge on hot lenses that were being machine polished on spindles. To do this job he walked back and forth over a distance of between 12 to 14 feet with a syringe full of water and a can of rouge in his hands. Johnson, a credible witness, testified without denial, that a few nights after he was employed his foreman Arthur Greig asked Webb how Johnson was getting along in his work and was told by Webb, "just fine." Johnson joined the Union on January 18, attended its meetings, solicited memberships and talked in behalf of the union on every opportunity "he had." He testified that a few nights before he was discharged he overheard Robert Chedester, a shift foreman, say to Greig "Johnson is getting along pretty well organizing" to which Greig answered "Yes, we will get rid of him in a few days." Prior to that time Greig had taken a friendly interest in Johnson. However, at about that time Greig overheard Johnson and P. L. Craig, a machine operator discussing the Union and observed that Johnson was carrying a union card in his pocket. He advised Johnson to leave his card at home. Thereafter Greig's

attitude toward Johnson changed and for the last 3 nights of his employment Greig spoke to him but once. Chedester and Greig denied that they had such a conversation. Because the circumstances surrounding Johnson's discharge so coincide with Greig's prophecy, the undersigned does not credit the denials.

On January 28 Johnson reported for work and found that his time card was not in the rack. He called this to the attention of the guard in charge and was told by him "You are to report to the personnel office." There Johnson was told by an unidentified employee that he had been discharged because his foreman had reported that Johnson was "not adapted" to his work. Johnson asked her if she would transfer him to another department and she refused to answer him. At the time, Johnson saw a man, whose name he did not know, being signed up to go to work. He then went back to the plant and asked the guard to be permitted to see the foreman of the department. The guard refused to let him enter the plant or call the foreman to the gate.

Greig testified that he discharged Johnson because he had received complaints from Craig, "the man he was helping"; that Johnson "wasn't moving fast enough; he wasn't taking care of the spindles and letting them burn"; that as a result the machine operator's production fell down. He attributed Johnson's failing to inability to walk fast enough up and down the row of spindles because of a physical handicap and to inaptness to do the type of work he was doing. He further testified that he did not discuss the discharge or possibility of transfer to another department with Johnson, but had referred him to the personnel office because "it is their function to see if they can put them in some other place."

The undersigned observed Johnson as he walked to and from the witness stand on three occasions, and also his movements in and about the court room after Greig had testified. His movements on foot appeared as normal as that of any other person in the court room. Marcus Dent, a shift foreman, was the respondents' next to the last witness. He testified that he had many times seen done the operation that Johnson performed in the plant and that an "average walk would carry [the operation] along very nicely." He further testified that "It might be once in awhile that they would have to make a dash for a spindle that didn't have enough rouge or water but as a rule it wouldn't keep them moving very fast."

Johnson worked for the respondents only 10 days. Until about the 7th day of the employment period Greig displayed a friendly interest in him, and received a commendatory reply from Webb when he asked him how Johnson was getting along on his job. When he learned that Johnson was an active union member his attitude toward Johnson suddenly changed to the extent that he ignored Johnson. Consistently within Greig's prophecy to Chedester, Johnson was discharged a few days thereafter.

It is significant that Johnson like Kidd, was not given a hearing by his foreman before his discharge and that the personnel officer and the guard ignored him in his quest for further employment.

The undersigned finds that Johnson was physically able to and did perform his duties in a workmanlike manner and rejects the testimony of Greig to the contrary. He further finds the respondents discharged Johnson on January 28, 1943, because he had joined and assisted the Union.

Buell Smallwood was first employed by the respondents on April 8, 1942, as an operator of a fine edging and centering machine. He joined the Union on December 15, 1942. Smallwood, a credible witness, testified without contradiction, that about 3 days thereafter his foreman, Everett Kinder, asked him why he had joined the Union and then told him that the Union "wouldn't get

in because it was a defense plant." On December 19, 1942, Smallwood was discharged. The Union presented Smallwood's case to respondents' counsel Edmund Marshall, and upon Smallwood's promise to him that he would "do better," Smallwood was rehired about January 9, 1943.¹³

Smallwood's activities in behalf of the Union consisted of attending its meetings and soliciting memberships. Shortly after he had been rehired, E. J. Polan, one of the respondents herein, accused Smallwood of soliciting memberships during working hours. Smallwood told him that he was not doing that, but that he was "doing everything [he] could outside the plant."

On February 5, 1943, during a smoking period in the plant, Kinder asked Smallwood if he knew he was being watched. When Smallwood told him that he did, Kinder said to him, "If you don't get some of those ideas out of your head you won't last long." Smallwood asked him if Kinder was referring to the Union, to which Kinder answered that the Union would never get into the plant because "it was a defense plant." That night Smallwood was discharged.

Smallwood testified that about 3 or 4 days after his discharge, he met Foreman Bert Perry in a local hotel and that Perry told him that he [Perry] "had risen from a rough grinder and a polisher to a foreman, and he [Perry] said he didn't need no union to do that." Smallwood further testified that Perry told him that he was "fired on account of the Union." Perry testified that he had a conversation with Smallwood at about the time and place indicated by Smallwood but denied that in that conversation or in any other conversation he had with Smallwood, was the Union mentioned. He then testified that in the conversation above referred to he asked Smallwood why he had been discharged, and was told by Smallwood "because I joined the union." Perry was an evasive witness and would not answer questions directly. The undersigned does not credit his testimony and finds that his conversation with Smallwood occurred substantially as related by Smallwood.

The respondents contend that Smallwood was discharged because he "Does not take orders as he should, does not stay at machine during working hours [and] does not take an interest in his work"

Tilman Morgan testified that he had been made foreman of the department in which Smallwood worked, about "a week or ten days" prior to Smallwood's second discharge; that inspectors were running to him "constantly" and advising him that Smallwood's work was not up to specifications, that he "constantly" checked Smallwood's work and when the errors were called to Smallwood's attention for correction, Smallwood "seemed not to take any interest." Morgan never discussed the reasons for his discharge with Smallwood.

Arthur Greig, respondent's shift foreman testified that about 3 or 4 nights before Smallwood was discharged, Morgan asked him to observe Smallwood's work; that he did so and noticed that Smallwood was out of the department more than seemed necessary and he "must have been a camel the way he drank water."

¹³ On the same day Smallwood signed a paper which stated: "Because he can be a good worker and intends to correct his former bad habits and work to the best of his ability for the good of the war effort, we shall reinstate Buell Smallwood on a probational basis for the rate of 57½ cents an hour for 3 mos. or until he proves the honesty of his intentions. At this time he will be fully reinstated as to the rate due him on the basis of time worked or at 62½ cents an hour."

(S) BUELL SMALLWOOD.

(S) MADELINE BURR.

Smallwood testified on cross-examination that he signed the paper "under pressure." He further testified, "I had to sign it to get my job back, and I signed it under pressure because I wanted my job back."

General Superintendent D. J. Slater testified that he noticed Smallwood "being in the hallways and in the basement. He might be smoking or loitering at those times."

Kinder did not testify.

The reasons advanced by the respondents for discharging Smallwood, would, under normal circumstances, be sufficient to justify a discharge for 'a' cause. It is clear however, that the respondents discharged Smallwood for reasons other than those advanced in the testimony of their witnesses. That Smallwood was an active Union protagonist was known to the respondents. That he was so marked by them is certain from Kinder's admonition to him that he should "get some of those ideas out of [his] head" or he "won't last long." Moreover it is clear that he was discharged for union activities as indicated by Foreman Perry who told Smallwood that he was "fired on account of the union."

Whatever may be said of the reasons advanced by the respondents for discharging Smallwood, the undersigned finds that they were not the motivating cause, but were used by the respondents pretexts to hide the true motive. The undersigned finds that Smallwood was discharged by the respondents on February 5, 1943, because he joined and assisted the Union. Smallwood does not desire reinstatement.

Marguerite Stein was first employed at the respondents' plant on October 27, 1942. At the beginning she worked as a fine grinder and after a month on that job she was made an inspector. She joined the Union on January 27, 1943. Stein, a credible witness, testified that about 6 weeks before her discharge, which occurred on February 12, 1943, her foreman, Marcus Dent, asked her "how the union was coming along." Dent denied that he ever had a conversation about the Union with Stein. However, his memory was so vague, with respect to other matters in connection with Stein's employment history that the undersigned discredits his testimony, and finds that he asked the question of Stein, and thereby indicated to her that he knew of her union sympathies.

On the morning of February 12, 1943, Stein reported for work about 30 minutes late, her shift hours being from 7:45 a.m. to 3:15 p.m. She did not stop to change into her slacks and hair net, as required by a plant rule announced the previous September that all women employees wear hair nets and slacks, but went about her duties clothed in regular dress. About 2:30 p.m. of that day she saw Dent talking to E. G. Polan, one of the respondents herein. Immediately thereafter, Dent discharged her. She was told by Personnel Officer Burr that she was discharged because she did not wear slacks and hair net.¹⁴

Stein testified without denial that she had reported late for work on other occasions, and on many days during her employment she did not wear the slacks and hair net; that she had never been criticized or reprimanded therefor; and that other girls did likewise with impunity. She also testified that the rule applied to women machine operators and not to inspectors and in this respect her testimony was corroborated by employee Black.

Dent testified that he had never told Stein she did not have to wear slacks and hair net and that the requirement applied to her as an inspector as it did to operators. He could not remember where the notice relating to slacks and hair nets was posted, nor who posted it. He testified it was "probably" posted under his supervision and that "All those orders came from the guards"; that there is no such notice posted at the present time and he did not know if

¹⁴ Stein, on cross-examination, was asked why she was discharged, and answered because she did not wear the hair net and slacks. It is apparent to the undersigned that her answer contained the reason given her by Burr, and not her independent thought on the matter.

there was a posted notice to that effect in January, February and March 1943. He further testified that he did not know if any of the other women employees worked in the plant during those months without slacks and hair nets; and that if they reported for work without them, they were "supposed to go home and get them as a general rule. If they lived a great distance away, there is a possible chance that they might have worked. I won't say they did and I won't say they didn't because I don't remember."

It thus appears that Stein's foreman, the person who discharged her for an alleged violation of a plant rule, knew little or nothing of the posting of the rule in the plant or the observance thereof by the employees. The available credible evidence clearly shows, however, that violations of the rule were tolerated by the respondents; that the strictest enforcement of the rule prior to Stein's discharge consisted of sending home to get her togs an employee who reported for work without them, and then only if the employee lived within "a great distance" from the plant. The undersigned does not condone the violation of plant rules by employees. However, the severe penalty meted out to Stein for the violation of a rule, the non-observance of which had been theretofore tolerated by the respondents, convinces the undersigned, and he finds that the respondents did not discharge Stein because she did not wear slacks and a hair net, but seized upon Stein's offense to rid the plant of a union member.

Glen Poling was first employed by the respondents on January 1, 1942. He spent the first 4 weeks of his employment learning prism grinding, a skilled job that requires one to be able to gauge manually the thickness of a piece of glass to the exactness of $\frac{2}{10,000}$ th of an inch. His services were terminated on February 15, 1943. During the period of his employment his wages were raised from 40 cents to 67½ cents per hour. Poling, a credible witness, testified that at no time did any supervisor complain about his conduct or workmanship, but that on the contrary, in about December 1942, Albert Polan, one of the respondents herein, told inspectors for the Minneapolis Honeywell Company, one of the respondents' principal customers, that Poling was the most experienced man in the respondents' plant for hand grinding prisms. That the respondents considered Poling to be a valued and essential employee is evidenced by the fact that commencing December 28, 1942, at the respondents' request, on the ground that he was a valued and essential employee, Poling was deferred from the draft for a period of 6 months.

Poling joined the Union in December 1942. On January 7, 1943, he was elected its financial secretary. He testified that one day during the lunch period Foreman Henry D'Ammato called him over to D'Ammato's desk in the plant and said to him "I hear you are a ring leader in the union" Poling denied that he was a ring leader but stated that he took an active part in the affairs of the Union. Foreman Earl King who was nearby and heard the conversation between Poling and D'Ammato stated that a lot of the employees were not joining the Union because they were afraid of their jobs. Poling told King that employees could not be fired for joining the Union, to which King answered "No, they can't fire you for that, but there are always other reasons."

D'Ammato, a witness for the respondents, testified that he had had a noon-hour conversation with Poling at a time when King was present and that the subject of the conversation was the amount of wages the employees would earn when the Union got "bargaining rights" in the plant. He denied that he had referred to Poling as a ring leader in the Union and could not remember King's part of the conversation. The undersigned does not credit the denial. King did not testify. The undersigned credits the testimony of Poling and finds that D'Ammato and King made the statements attributed to them by Poling.

Poling further testified that on February 15, 1943, his superintendent, E. H. Diehl told him that Albert Polan wanted to see him in Polan's office. There, according to the testimony of Poling, Polan told him in the presence of Diehl that Diehl had complained that Poling was not cooperative with him; that Polan did not want to discharge him because he did not want a discharge to appear on Poling's record; and that Poling could either quit his job, or the respondents would "lift his deferment," and if he lost his deferment, Poling would be drafted into the Army. Poling further testified that he chose the first of the two alternatives so that he would be in a position to get another job, and resigned. Before leaving the plant, Poling went to Diehl and asked him to explain just how he had not been cooperative. Diehl did not answer Poling. On May 8, 1943, Poling enlisted in the Engineers Corps of the United States Army.

At the hearing the respondents introduced in evidence Poling's final pay ticket which was signed by Diehl and Roy Hatton, Poling's immediate supervisor. The pay ticket stated that Poling left the employ of the respondents on February 15, 1943, of his own accord, because, as stated on the ticket, he was "dissatisfied." Also noted on the ticket were the observations of Diehl and Hatton that Poling was "not industrious, indolent and unable to do work properly."

Polan denied that there was any talk of lifting Poling's deferment at the conference held with Poling on February 15. He testified that Poling was a good worker but for some "stranger reason"¹⁵ he had lost the exactness that was required of him to do his work properly; that Diehl complained to Polan about the matter and Poling was sent to him "to talk with and see when he doesn't do as he should, and make an effort to correct that"; that at the conference "I cursed him out as he should have been cursed out, . . . I told him that he was falling down and there must be some reason, and if there was anything I could do to help get it straight he should come to me. . . . The boy got huffed and he said 'I quit.'" He further testified that although Poling seemed to be "a nice clean chap" he made no attempt to induce Poling to remain in the employ of the respondents because "the minute his reaction to me when I am ready to help him and trying to help is one of defiance, then he has no place," and that "today it [Poling's work] is being done by a man whose keenness of the feeling is accentuated. He has only one hand, and he has twice as much feeling in one hand as we have in two" and that he would not have put Poling in another job "because it is not advantageous to use a man of greater skill in a job that requires less skill."¹⁶

Diehl, on the other hand, testified that in December or November of 1942, he assigned Poling to train Gobel Osborne in the job of hand grinding because he had noticed that Poling was becoming erratic in his work, due to what Diehl described as a nervous condition, and it was necessary to have a man in the plant who was able to efficiently perform the work that Poling was doing; that he transferred Poling to another department where his work "didn't require this delicate touch he had to have to do the operation he was performing"; that

¹⁵ Polan testified as follows "Some of the work which Glen Poling did required such a surface flatness that the variance of a couple thousandths of an inch would spoil it. It is recognized that the people versed in that work become a little unbalanced in doing it. If a man is unbalanced, and if he loses his capacity to maintain the proper perspective, his value to us and to the company in that particular work ceases

Q Do you think that Glen had reached the point where his equilibrium was a little unbalanced?

A. I think everybody in this work is a little unbalanced.

¹⁶ Asked whether Poling would have been discharged had he not "resigned," Polan replied, "No, I wouldn't have [discharged him.] Normally we would have given him a week to see if there was a greater percentage of acceptable elements."

he did not know whether Poling resented the transfer but that he refused to apply himself to his new work; that on February 15, Poling told him, "I don't believe you want me around any more, I think I'll quit."; that he suggested to Poling that the two of them go down to Polan's office and talk the matter over with him; that they did so; that there was no mention of draft deferment in his presence and that Poling asked Polan if he would get him a release to which Polan answered that he would help get him a release and help him get a job somewhere else "and that is about all. He [Poling] left then. I shook hands as he left the plant and wished him success and we left good friends."

On cross-examination Diehl testified that between December 1942 and February 15, 1943, Poling and Osborne together did the same job, that is "the two of them doing a one man job;" that Osborne was no longer doing hand grinding in the plant, but that he had been transferred to another department.

Hatton testified that "around November or December . . . Glen [Poling] seemed to lose interest somewhat in his work and later he was transferred to another department because Mr. Diehl and I had talked over on numerous occasions as to how the work was being done on the hand correction, that is the result of it, and we thought that possibly due to these nervous conditions which he seemed to show—we didn't know the cause of it in any way—that he might be better fitted in another department. In the meantime Glen trained Gobel Osborne to do his work."; and that "probably a month or two months" prior to the termination of his employment he was transferred to the roughing department in the plant.

It thus appears that the testimony of respondents' witnesses Polan, Diehl and Hatton, is inconsistent in that contrary to the testimony of Polan, Osborne was transferred from the hand grinding job to another department and to a job requiring less skill, and is still working for the respondents; and contrary to the testimony of Polan and Diehl, Poling was transferred into the roughing department a month or two prior to the termination of his employment. Moreover, the reasons given for Poling's discharge on his final pay ticket are contradictory in that he is termed "dissatisfied," a charge obviously sought to be related to his alleged remark to Diehl, and it is also claimed that he was "indolent and unable to do work properly," a charge which finds no support in the credible testimony. Nor is it probable that Polan would agree to get a "release" for Poling and find him a new job with another employer if Poling had assumed an attitude of defiance to a degree that kept Polan from trying to keep Poling as an employee in another department; particularly when that procedure was the policy of the respondents and as Polan testified, Poling was a good worker. Because of the variance in the testimony of Polan, Diehl and Hatton, and from his observation of them as witnesses, the undersigned rejects their testimony except insofar as it is corroborative of the testimony of Poling whom the undersigned has found was a credible witness.

In rebuttal, Poling testified, and the undersigned finds, that he was assigned to the job of training Osborne as a hand grinder; when Osborne became efficient in the job he was given Poling's job; Poling was kept in the same department and because of his wide experience he was used as an "all around man" and worked on all the jobs of the department as occasion needed him. He further testified, that he had never suffered a nervous condition and that the first intimation he had that his employment was to be terminated was on February 15, when Diehl told him that Polan wanted to see him in the office. Although Polan testified that notice of the severance of employment or a draft-deferred employee is forwarded to that employee's draft board on the day following the severance of employment, no such notice of Poling's severance of employment was sent to his draft board until March 29, 1943.

From all the evidence, the undersigned is convinced and finds that on February 15, 1943, Poling was told by Polan that he could either quit his job or the respondents would lift his deferment and that then he would be drafted into the Army; that Poling chose to quit so as to enable him to get another job; that Poling was a good capable worker as a hand grinder and proficient in all the jobs in the department; that on the day of the termination of his employment and for several weeks prior thereto, Poling was not working on the specific job of hand grinding, but was the utility man of the department, and that Poling had given the respondent no legitimate occasion to terminate his services. The undersigned finds that the respondents knew and resented the fact that he joined and assisted the Union, and that the circumstances surrounding the termination of Poling's employment makes that termination of employment tantamount to a discharge, effected in violation of the Act.

Madeline Peyton entered the employ of the respondents on October 22, 1942, as a grinder in the blocking department. After 3 months of service she qualified as a satisfactory worker and was given a raise in wages of 12½ cents per hour, on the recommendation of her foreman, George Sweitzer. For a period during her employment, she trained new employees and assisted others in their jobs. Peyton joined the Union in December 1942 or January 1943. She solicited memberships, passed out union literature and attended union meetings.

At the close of the shift on February 22, 1943, Sweitzer, without giving her a reason, told Peyton to punch her time card and turn in her badge to the guard in charge, because she was discharged. On the following day she returned to the plant, got her final check and termination of employment slip, which stated that she had been discharged, but noted no reason therefor.

The respondents contend that Peyton was discharged because she did not "do her work," smoked at times other than rest periods and slept on her work table.

In support of the respondents' contention, employee Irvin Bowman testified that on a day shortly prior to the date of Peyton's discharge, Sweitzer asked him to observe that Peyton was sleeping during working hours, which he did, and that on February 24, 1943, he signed a statement, prepared by Sweitzer, at Sweitzer's request, which statement reads as follows:

In regards to Madeline Peyton: Aside from her not doing her work and other violations. We actually saw her trying to sleep on the working table.

On cross-examination Bowman testified that he did not know if Peyton was "doing her work"; that the "other violations" noted in the statement could have been that she left the "work room"; and that he did not know if Sweitzer had given her permission to rest when she was "caught up" in her work and to leave the "work room" when necessary.

The undenied testimony of Peyton is that in November 1942 she became pregnant; that thereafter Sweitzer told her not to assist other employees in their production quotas anymore, and that she should rest, and if desirable, sleep, during periods while she was waiting for further work. She denied that she violated the "no smoking" rule and testified that she had permission from Sweitzer and did go to the rest room when necessary.

The undersigned finds that Peyton did not violate any company rules; that she was an efficient worker, and that her alleged indiscretions of going to the rest room and sleeping at her table during periods when she was waiting for work, was done with the permission of her foreman, Sweitzer, and at his instructions.

It is to be noted that, as found above, on February 20, 2 days before Peyton's discharge, Sweitzer indicated to her his antipathy toward the Union and her

activities in its behalf. Her abrupt discharge without reason given therefore in direct violation of the respondents' policy and Sweitzer's anti-union prejudice which manifested itself emphatically in her case, combine to convince the undersigned and he finds that Peyton was discharged on February 22, 1943 because she joined and assisted the Union. The reasons advanced by the respondents to support a contrary conclusion lack support in the credible evidence and are, in the circumstances disclosed in this case, clearly pretexts.

Fred Allen Rudman joined the employ of the respondents on January 7, 1943 as a plant guard. Because of his duties and the fact that he was required to "carry a gun" while on duty, he was not eligible to join the Union and was not a member. His two sons, however, George and Charles, were active Union members prior to their discharge from the employ of the respondents, which occurred prior to March 1, 1943, when Rudman was discharged. He was a Union sympathizer and openly told employees, who asked him what he thought about joining the Union, that he was a firm believer in collective bargaining. Rudman, a credible witness, testified that about 2 weeks before he was discharged, and while he was on duty at the front gate of the plant, his foreman, Russell Carte, and Albert Polan told him to put two Union representatives, who were distributing Union literature there "off the [public] sidewalk and make them go away" which he refused to do. Polan testified that he remembered an incident when handbills were being distributed, and he instructed Carte to see that "the doors were kept open," and denied that he ever gave any orders to Rudman in that regard. Carte testified that persons may have been distributing handbills on an occasion when he instructed Rudman to "clear the entrance," but that he does not know if Rudman obeyed the order. The undersigned finds that about 2 weeks before his discharge, Polan and Carte ordered him to clear the sidewalk of two Union representatives who were distributing Union literature there, and that Rudman refused to do so.

On March 1, 1943, Rudman reported for duty and found that his card was not in the rack. The guard in charge told him to report to the personnel office. There he was told by Lenertz that his final pay check was not ready and to return for it on the following day. Then, according to the testimony of Lenertz, an argument followed between her and Rudman concerning the legal right of an employee to have his pay check within 4 hours after the close of his last work day, during which Rudman became "abusive." Rudman demanded that he be given a reason for his discharge, which he never received. Rudman impressed the undersigned as a truthful, forceful, kindly individual and was aggressive in demanding what he considered to be his rights. The undersigned finds that he argued with Lenertz but that Rudman was not abusive.

The respondents contend that Rudman was discharged because he refused to obey Carte's orders to patrol the plant building.

Carte testified that about 2 weeks before he discharged Rudman he called Rudman to his office and cautioned him that he was talking to employees too much and too loudly, and told him that he should sit down and not stand up when he was serving as guard at the front entrance of the plant, and to alternate that post with Guard Switzer Bias in the patrol of the plant building; that "It went on for a few days, and I kept seeing the other guard patrolling all the time, and I spoke to him and asked him if Mr. Rudman ever relieved him, and he says: 'No, he stays up at the front gate'; and that he discharged Rudman "For the simple reason it seemed to me like the man didn't want to take orders," that is, to alternate with Bias.

Bias testified that he received orders from Carte to alternate with Rudman, but never did it, because Rudman was an older man on the job than he was and

if Rudman did not want to alternate with him, that was Rudman's prerogative because of his seniority; and that he was never reprimanded by his superiors for not doing so.

Rudman denied that he had been cautioned by Carte in any regard concerning his work or that Carte ordered him to alternate with Bias. He testified that Bias told him that Carte wanted Rudman and Bias to alternate their posts, and that he never refused to do so. Rudman's work as a guard was praised by D. J. Slater, general superintendent of the respondents plant.

The fact that Rudman was never given a reason for his dismissal is significant. This is particularly true when it is remembered that for 2 weeks, Carte allegedly observed that Rudman was not alternating with Bias, questioned Bias about it, but said nothing to Rudman. It was about that time that Rudman had refused to disturb the union representatives who were distributing literature in front of the plant. It is more significant, however, that Rudman was discharged for allegedly refusing to alternate his post with Bias and that Bias was not so much as reprimanded for disobeying the same order. Since it was the policy of the respondents that Carte should discuss the discharge with Rudman, the fact that it was not done, but to the contrary, he was summarily told to report to the personnel office when considered with the foregoing observations, leads the undersigned to reject the respondents' contention. As a witness, Carte was defiant and arrogant. The undersigned does not credit his testimony that he discharged Rudman because he allegedly refused to alternate his post with Bias or because "it seemed to me the man didn't want to take orders." It has been found that Rudman did, however, refuse to obey Carte's order to him to clear the sidewalk in front of the plant gate, of union representatives who were engaged in union activities. The respondents do not contend that Rudman was discharged for refusing to obey this order. However, the undersigned is convinced that Rudman's known union sympathies¹⁷ in conjunction with his refusal to interfere, at the respondents' order, with legitimate union activities caused the respondents to discharge him on March 1, 1943, in violation of the Act.

Louise Baker was first employed by the respondents on November 2, 1942, as a fine grinder. At the end of the first 90 days of her employment, she was made a permanent employee and given a raise in wages of 10 cents per hour. Baker joined the Union in January 1943. She attended its meetings, solicited memberships and talked about the Union to her fellow employees in the plant during leisure and rest periods.¹⁸ On March 3, 1943, she reported for work and found that her time card was missing from the rack. She asked the guard in charge to find it for her and instead he found a note instructing her to report to the personnel office. There she got her final pay check and separation slip stating that she was discharged, but no reason therefor was noted thereon. She then telephoned her foreman, Marcus Dent and asked him the reason for her discharge. His answer was "Sorry, Louise." She then asked him, "Wasn't my work all right" and he answered "Sorry, Louise," and terminated the conversation.

Marcus Dent testified that he discharged Baker because she became "indifferent to her work and the type of work she was putting out"; that he had checked her work for a period of from 4 to 6 weeks and found that she was not producing "enough." He could not remember the type of work she was doing or how much her production lagged. He "believed" that he "talked with her to the effect that she wasn't putting out enough work" but he could not remember

¹⁷ Rudman made known his pro-union sentiments to Carte in a conversation which occurred about 2 weeks before his discharge.

¹⁸ Baker testified that she solicited union memberships from "older employees" who were friends of Foreman Marcus Dent.

when, or what her answer to him was. He did remember, however, that he did not talk with her before her discharge. There was nothing definite in Dent's testimony, regarding Baker's discharge; he convinced the undersigned that his testimony was incredible and an attempt to legitimize Baker's discharge.

In view of the respondents' patently anti-Union attitude, as hereinabove found, the undersigned is convinced and finds that the respondents discharged Baker on March 3, 1943, because she joined and assisted the Union.

Hugh Pribble, who is 73 years of age, was first employed by the respondents on September 5, 1942, as a cleaning janitor. He immediately joined the Union and actively solicited memberships. Pribble was outspoken in his Union sympathies and on several occasions he discussed the Union with the respondents' Building Supervisor, Zimm, telling him that he had joined the Union. He was discharged on March 3, 1943.

Albert Polan testified he had seen Pribble "struggling" with another employee in one of the departments and after that "on a dozen occasions" he had found that Pribble's job was not "being done," so he instructed Foreman Hatton to "get rid of him."

Hatton testified that Pribble "never done a first class janitor job . . . as far as I know" and that he was discharged because Hatton thought Pribble was "incapable physically of performing his duties." He also testified that Pribble was "unpopular" with the employees because of his "grouchiness," which "was a detriment to the production."

Diehl testified that he signed Pribble's final pay ticket because "the old man was most too old for the job really" and because of complaints he received from employees that Pribble carelessly bumped into them when they were carrying trays of glass in their hands and that he talked excessively to employees. He further testified that on the day previous to Pribble's discharge, Pribble collided with a girl inspector, tore her hose and then entered into a heated argument with her.

Pribble worked for his immediate previous employer 11 years. He and Polan had known each other for 20 years, and it was because of this acquaintanceship that Polan arranged to have him work for the respondents. It thus appears that Polan knew, or should have known, Pribble's capacity for work and his temperament. Pribble appeared to the undersigned to be in good physical condition, sturdy and rugged and far less than 73 years of age. Pribble testified that Polan had often told him that his work was satisfactory; that he had never been criticized by a supervisor; and never was given any opportunity to discuss his discharge with any of them. Nor is there any testimony that any supervisor, except Polan, discussed his work with him at anytime during his employment.

That Pribble was physically able to do a cleaning janitor job is apparent to the undersigned and was apparent to Polan when he put him to work, which was only 6 months before he was discharged. His alleged excessive talking were not factors considered by Polan and Hatton in discharging him and his alleged neglect of duty, as stated by Polan, was not a factor considered by Hatton and Diehl in their testimony concerning Pribble's discharge. It is significant that Polan, Diehl, and Hatton should differ in their testimony which is general and vague with regard to the reasons for Pribble's discharge.

Pribble was an honest and credible witness. The fact that he was not given a reason for his discharge added to the fact that he was a competent employee and one whose union membership and sympathies were well-known, lead the undersigned to conclude and he finds that Pribble was discharged on March 3, 1943, by the respondents because they knew of, and resented his union affiliation and activity.

Thelma Black was employed by the respondents about April 13, 1942, as a fine lens grinder, at a wage of 30 cents per hour. At the time of her discharge on March 15, 1943, she received a wage of 57½ cents per hour and was one of the oldest employees in her department in point of service. She joined the Union late in December 1942, attended its meetings, solicited memberships, and distributed union literature to her fellow employees. The latter activity was known to plant supervisors among whom were E. Polan and Foreman Sweltzer who received handbills from Black in front of the plant.

On March 15, 1943, Black became ill. She remained at home under the care of a doctor and a nurse until March 22. On that day she returned to work and found that her time card was not in the rack. The guard in charge told her that Allen Polan, one of the respondents herein, wanted to see her. Polan told her, in the presence of her foreman, Ptzseck, that she had not been ill, there was nothing she could do to change the situation, and that she should get her final pay check. Black offered to furnish proof that she had been home sick, but was not given the opportunity by Polan.

Frances Flesher Moore, an investigator for the respondents, testified that one day in March or April she was assigned to investigate Black, who on that day had left work at about 11 a.m. because of claimed illness. She testified that she went to the address given to her by the respondents and inquired for Black; that she was told by the landlady to whom she talked that Black was not in, but had "gone uptown." Black, a credible witness, testified that on that day, which was March 5, 1943, she left the plant because she was ill, went to bed for a few minutes in the room she lived in in Huntington, and then went to her own home some distance "up-town" for the rest of the day. The undersigned finds that on March 5, 1943, Black was ill and did not work on that day because of that fact.

Black returned to work the following day, March 6, and continued in her job until March 14, 1943. On that day, she again became ill and went to her home until March 22. Her foreman was notified by telephone of her illness. Black's uncontradicted testimony is corroborated by Nurse Maude Duncan, a credible witness, that she was ill and at home during that period, attended by a physician and visited by Duncan, who is a Red Cross nurse.

Foreman Ptzseck testified that Black was an excellent worker but that she was discharged because he "didn't see any sense to her coming in one day and starting something and then leaving production stand for another day."¹⁹ He further testified that he "believed" Black was discharged on the morning following the investigation made by Moore.

Black's immediate foreman, Ernest Howerton, testified that Black was discharged on March 6 following an investigation that had been made by Moore, who had reported that Black was not at home sick. He further testified that she was an excellent worker.

It is thus apparent that Black's discharge was defended by the respondents on the ground that she allegedly had feigned sickness on March 5, which is not supported by the evidence and presumably on the basis of the report made by Moore. Their pay roll records show that she worked on the 6th and through the 13th, which apparently was unknown to Howerton and Ptzseck. Black offered to present proof that she had been ill, but was denied that opportunity to explain

¹⁹ The respondent produced the absentee record of Black which showed that she was absent from work as follows: September 26 and 30; October 2 and 3; November 6 through 21; December 12; January 28; February 5, 17 and 29; March 1, 5 and 14. In November she was married, which accounts for the 2 weeks absence in that month, which was excused by the respondents.

her legitimate absence by Polan. That fact is so contrary to the respondent's policy of according discharged employees a hearing with a view to adjusting such matters, as to compel the undersigned to reject their defense. When this fact is considered with the positive testimony of Howerton and the vague testimony of Ptzseck, that she was discharged on March 6, following Black's alleged feigned illness, and Polan's association of her discharge with that event, the undersigned is convinced and finds that the respondents initialized an absence which the record shows was legitimate in an attempt to effect her discharge for discriminatory reasons.

Wade Wilson was first employed by the respondents on August 12, 1942, as a janitor. In point of service he was the oldest janitor in the plant, and "all the bosses" said he was the best janitor. He joined the Union shortly after his employment and solicited one membership for the Union. In April 1943, his foreman, James Scales, told him that he knew Wilson was talking "union" and "all that joined and affiliated with that organization can get them another job."

On June 15, 1943, Wilson reported for work at 3:15 p. m. He met Scales and was asked by him if he had seen the 4th and 5th floor janitors. Wilson said he had not seen them to which Scales said, "I am going to get rid of them . . . and get men like you and Cap Brown." Wilson was admittedly a good worker.

Wilson, a credible witness, testified that about 5:15 p. m. that day, June 15, Scales came to him and asked him to look after the cleaning of the third floor in addition to doing his regular work. According to Wilson, the following colloquy occurred: Wilson said "God, Jim, don't you think you have enough power over me, are you going to work me to death. I can't do that." Scales then said: "You can't do it?" Wilson countered with the question, "How am I going to do it?" and was then told by Scales, "Go and pull your card," which meant that he was discharged.

Scales testified that on the occasion just referred to, he was short of help and "so when I am short like that I always ask the janitor on the floor below to help . . . you know in order to carry the work along. He flatly refused and went down and punched his card, and there was nothing I could do. He quit . . . I said, "You mean you aren't going to help me?", and he went down and punched his card."

It thus appears that the respondents contend that they did not discharge Wilson but that he quit because Scales asked him to do additional work, and it is Wilson's testimony that he was discharged because he objected to doing that work. It is not necessary to resolve the conflict. That Scales had no intention of discharging Wilson on June 15 is evidenced by Wilson's own testimony that Scales was going to discharge two other janitors and replace them with men like Wilson and Cap Brown. There is no evidence that the additional work which Scales asked Wilson to perform was a discriminatory use of authority or a departure from the customary practice in the plant. Therefore, upon Wilson's own version, his refusal constituted insubordination and a legitimate cause for his discharge.

The undersigned finds that Wilson was not severed from the pay roll of the respondents because of this union membership and activity.

The undersigned finds that the respondents discharged and thereafter refused to reinstate to their former or substantially equivalent employment on the dates following their names, the following persons: Doreene Eckley, January 19, 1943; Gaylord Kidd, January 25, 1943; Edgar L. Johnson, January 28, 1943; Buell Smallwood, February 5, 1943; Marguerite Stein, February 12, 1943; Glen Poling, February 15, 1943; Madeline Peyton, February 22, 1943; Louise Baker, March 3, 1943; Hugh Pribble, March 3, 1943; and Thelma Black, March 15, 1943, for the reason that they joined and assisted the Union, and Fred Allen Rudman on March

1, 1943, because of his sympathies for the Union, thereby discouraging membership in the Union and interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The undersigned further finds that the respondents, by the statements of Greig and Chedester, on or about January 15, 1943, which were overheard by Johnson; the statements of Dent to Stein in January 1943; the statements of Kinder and Perry to Smallwood on or about December 13, 1942, February 5 and 8, respectively; the statements of Scales to Wilson on April 15, 1943; and the statements of D'Ammato and King to Poling about January 7, 1943, as above set out, the respondents interfered with, restrained and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The undersigned finds that the activities of the respondents set forth in Section III above, occurring in connection with their operations 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

Since it has been found that the respondents 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.

It has been found that the respondents discriminated in regard to the hire and tenure of employment of Gaylord Kidd, Edgar L. Johnson, Marguerite Stein, Mrs. Madeline Peyton, Fred Allen Rudman, Mrs. Louise Baker, H. T. Pribble, Mrs. Thelma Black, and Buell Smallwood. Smallwood does not desire reinstatement. It will be recommended that, except as to Smallwood, the respondents offer them immediate and full reinstatement to the positions they held at the time of their discharge or if these positions are not available, to substantially equivalent positions. It will be recommended also that the respondents make whole Gaylord Kidd, Edgar L. Johnson, Marguerite Stein, Mrs. Madeline Peyton, Fred Allen Rudman, Mrs. Louis Baker, H. T. Pribble, and Thelma Black, for any loss of pay they may have suffered by reason of the discrimination against them by payment to them of a sum of money equal to the amount each would have earned as wages from the date of the discrimination against them to the date of the offer of reinstatement, less their net earnings,²⁰ during said period, and that Smallwood be made whole for any loss of pay he may have suffered from the date of the discrimination against him to the date of his present employment, less his net earnings during that period.

It has been found that the respondents discriminated with regard to the hire and tenure of employment of Glen Poling and Doreene Eckley. They are now serving with the Armed Forces of the United States and accordingly are not available for immediate reinstatement. It will be recommended that the respondents upon application by Glen Poling and Doreene Eckley within 40 days

²⁰ By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N. L. R. B.* 311 U. S. 7.

after their discharge from the Armed Forces of the United States offer them reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges. It will be recommended further that the respondents make whole Glen Poling and Doreene Eckley for any loss of earnings they may have suffered by reason of the respondents' discrimination against them by immediate payment to them of a sum of money equal to the amount each normally would have earned as wages during the period between the date of discharge and the date of entry into the Armed Forces less their net earnings during that period; and by payment to them of a sum of money equal to the amount each normally would have earned as wages between a date 5 days after their timely application for reinstatement and the date of offer of reinstatement by the respondents less their net earnings during said period.

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

CONCLUSIONS OF LAW

1. Optical Workers Coordinating Committee, affiliated with the Congress of Industrial Organizations, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Gaylord Kidd, Edgar L. Johnson, Doreene Eckley, Glen Poling, Marguerite Stein, Mrs. Madeline Peyton, Fred Allen Rudman, Mrs. Louise Baker, H. T. Pribble, Mrs. Thelma Black, and Buell Smallwood, and thereby discouraging membership in Optical Workers Coordinating Committee, affiliated with the Congress of Industrial Organizations, the respondents have engaged in and are engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

3. By interfering with, restraining and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondents have engaged in and are engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

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

5. The respondents did not violate the Act by discharging Wade Wilson.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, and the entire record in the case, the undersigned recommends that the respondents A. S. Polan, L. M. Polan, C. M. Polan, Lake Polan, Jr., and E. J. Polan, a partnership doing business under the firm name of Zenith Optical Company, their officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Optical Workers Coordinating Committee, affiliated with the Congress of Industrial Organizations, or in any other labor organization of their employees by discharging or refusing to reinstate any of their employees, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of their employment;

(b) In any other manner interfering with, restraining, or coercing their employees in the exercise of the rights to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining for their mutual aid or protection as guaranteed in Section 7 of the Act.

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

(a) Offer to Gaylord Kidd, Edgar L. Johnson, Marguerite Stein, Mrs. Madeline Peyton, Fred Allen Rudman, Mrs. Louise Baker, H. T. Pribble, and Thelma Black, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges;

(b) Make whole Gaylord Kidd, Edgar L. Johnson, Marguerite Stein, Mrs. Madeline Peyton, Fred Allen Rudman, Mrs. Louise Baker, H. T. Pribble, and Mrs. Thelma Black, for any loss of pay they may have suffered by reason for the respondents' discrimination in regard to their hire and tenure of employment and terms and conditions of their employment by payment to them of a sum of money equal to that which each normally would have earned as wages from the date of the discrimination against him to the date of the offer of reinstatement, less his net earnings during this period; and make whole Buell Smallwood for any loss of wages he may have suffered from the date of the discrimination against him to the date of his present employment less his net earnings during that period;

(c) Upon application by Glen Poling and Doreene Eckley within 40 days after their discharge from the Armed Forces of the United States offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;

(d) Make whole Glen Poling and Doreene Eckley for any loss of earnings suffered by reason of the respondents' discrimination against them by immediate payment to them of a sum of money equal to the amount each normally would have earned as wages during the period between the date of their discharge by the respondents and the date of their entry into the Armed Forces less their net earnings during that period; and a sum of money equal to the amount each normally would have earned as wages between a date 5 days after Poling's and Eckley's timely application for reinstatement and the date of the offer of reinstatement by the respondents, less their net earnings during that period;

(e) Post immediately in conspicuous places in its Huntington, West Virginia plants and maintain for a period for at least sixty (60) consecutive days from the date of posting, notices to their employees stating: (1) that the respondents will not engage in the conduct from which it is recommended that they cease and desist in paragraph 1 (a) and (b) of these recommendations; (2) that the respondents will take the affirmative action set out in paragraph 2 (a), (b), (c), and (d) of these recommendations; and (3) that the respondents' employees are free to become or remain members of Optical Workers Coordinating Committee, affiliated with the Congress of Industrial Organizations, or any other labor organization of their choice and that the respondents will not discriminate against any employees because of their membership or activity in any of these organizations;

(f) Notify the Regional Director for the Ninth Region in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondents have taken to comply therewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report the respondents notify said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondents to take the action aforesaid.

It is recommended that the complaint be dismissed as to Wade Wilson.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 2—as amended, effective October 28, 1942—any party may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

GUSTAF B. ERICKSON,
Trial Examiner.

Dated September 14, 1943.