Interboro Contractors, Inc. *and* John Landers and William Landers. *Cases Nos. 2–CA–10569–1 and 2–CA–10569–2. March 31, 1966*

DECISION AND ORDER

On September 8, 1965, Trial Examiner Thomas S. Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in and was not engaging in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief, and the Respondent filed an answer to the General Counsel's exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Jenkins and Zagoria].

The Board has reviewed 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 Trial Examiner's Decision, the exceptions, answer to exceptions, briefs, and the entire record in these cases, and finds merit in the General Counsel's exceptions. Accordingly, the Board adopts the findings of the Trial Examiner only to the extent consistent herewith.

The only issue here is whether the Respondent discharged two employees, John and William Landers, in violation of Section 8(a)(1) and (3) of the Act. The Trial Examiner found that it did not. For the reasons stated below, we disagree with the finding that the discharges did not violate Section 8(a)(1).

As more fully detailed in the Trial Examiner's Decision, the pertinent facts are as follows:

On March 25, 1965,[1] brothers John and William Landers were employed by Respondent as steamfitters. On April 15, Respondent discharged John and William. During their employment, John and William made the following complaints:

> 1. On March 25, on arrival at the jobsite, John and William met employee Novak who stated that foreman Koster had been absent from the jobsite for 3 days because of sickness. John asked Novak if he had called the Union to secure a partner for himself in Koster's absence, if he had reported the job to the

[1] All subsequent dates occurred in 1965.

Union, and if the Union business agent for the area had ever visited the jobsite. Because of Novak's unsatisfactory answers, John asked Novak if he was an "A man" [2] to which Novak replied that he had a "book" at home, John requested that Novak produce the book the following morning.

When George Soebke, Respondent's field superintendent, arrived at the jobsite, John stated to him that he and his brother had not been met by Respondent's President Kleinhans as promised and inquired if the job was an "8-hour job" [3] and paid "expense money." [4] Soebke denied having any knowledge of these matters. Soebke then assigned John to do some welding and William to put some hangers on the ceiling. John refused and said that he and William did not work separately and asked Soebke if he was familiar with the collective-bargaining contract.[5]

Soebke suggested that the job did not require two men, but John insisted that the contract required that he and William work together and refused to do the welding unless they did so. John also called attention to the fact that Novak had been working 4 days without a partner and that he doubted that Novak was an "A man." John also stated that he was going to call the Union and "get a business agent down here to straighten the job out." Soebke assigned both Landers to weld and left the jobsite. John then called the Union and requested that a business agent visit the jobsite.

On the following day, foreman Koster returned to work and John repeated to him all the complaints he had made the previous day. Some of Koster's replies did not satisfy John, and he asked to see Koster's union book. John also told him that he had called the Union.

On March 29, Union Business Agent Gould came to the jobsite and John apprised him of his complaints. Upon investigation Gould discovered that Koster was an "A man" but that Novak was not. Gould informed Koster that the men were to work in pairs as provided for in the contract and that he would replace

[2] The Respondent has a collective-bargaining contract covering steamfitters with Local 638, Enterprise Association of Steam, Hot Water,. Hydraulic, Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and Vicinity, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, herein called the Union. The Union is divided into two divisions: one is the construction branch which is made up of steamfitters, and the other is the service branch which is made up of metal tradesmen. Steamfitters are commonly referred to as A men and metal tradesmen as B men. Steamfitters and metal tradesmen have different union books and are covered by separate collective-bargaining agreements.

[3] The term "8-hour job" refers to a job from 8 a.m. to 4:30 p m. with 1-hour work at double time.

[4] The term expense money refers to a rate of pay over and above that provided for in the collective-bargaining agreement.

[5] The contract provides that one man shall act as a fire watch when another man is welding. The New York City Fire Regulations also require a fire watch when welding is being performed.

Novak the next morning with an "A man." He also ordered Koster before the executive board of the Union to be briefed on the duties of a union steward. John had also told Gould that a "prefabricated" boiler was to be delivered to the job contrary to the contract since it had piping of less than 4 inches. Gould told Koster that if and when such a boiler arrived on the job, Koster was to call the Union to have it inspected. Gould called Kleinhans and informed him of his investigation of the complaints and the action taken to correct them. Kleinhans wanted to know who had made the complaints but Gould told him that was irrelevant. Kleinhans answered that it seemed to him that he had a couple of "troublemakers" on the jobsite.

2. Later that day, John requested that Respondent supply him with protective leather welding equipment. Koster agreed to order the equipment and maintained that he had done so whenever John reiterated his request. Soebke asserted that he delivered the equipment to the jobsite within the next day or two, but John contended such equipment was used exclusively by Collins, the "A man" Gould sent to replace Novak.

3. On March 30, Kleinhans came to the jobsite and John, flanked by William and Collins, asked him if they were going to get the 8-hour job and expense money. Kleinhans answered that he could see no reason for 8-hours or expense money but that he might consider them later. John asked him "what the hell he promised the job [in] the first place and brought us to the job to work." Kleinhans left the area without answering.

4. On Friday, April 2, Soebke paid the employees for work they had performed through the previous Tuesday. John, William, and Collins objected and pointed out that under the contract they were to be paid through the previous Wednesday. Soebke replied that it was Respondent's custom to pay only through Tuesday, and it was a bookkeeping inconvenience to pay through Wednesday. The Landers and Collins insisted on being paid through Wednesday and, after John threatened to wait at the jobsite on double time and to contact the local union, Soebke agreed to bring them the money on Monday, which he did.

5. On April 7, the prefabricated boiler arrived on the jobsite, and John asked Koster if he was going to call the Union as directed by Gould. Koster said, "No," and that the boiler was satisfactory. John told him he was going to call the Union—he did so the next morning—and request that a business agent visit the site. John also called the Union at least twice more in the next few days. The Union business agent never visited the jobsite in response to these calls.

6. Between April 7 and 15, the Landers, Collins and Koster moved the boiler and a refrigeration unit into place by the use of steel pipe rollers and a half-ton block and tackle. John complained the pipe rollers were not "perfectly round" and that "standard equipment" for such work should consist of 3 or 4 inch hardwood rollers and a couple of 2-ton chain blocks.[6]

In the late afternoon of Thursday, April 15, Soebke appeared on the jobsite and told the Landers he was paying them off. When John asked the reason for the discharges, Soebke said he had no reason but was merely carrying out orders.

On April 20, John and William, as individuals, filed unfair labor practice charges against Respondent because of their discharges. On May 25, the General Counsel issued a consolidated complaint alleging that Respondent had violated Section 8(a)(1) and (3) by discharging John and William Landers "because said employees insisted upon the full performance by Respondent of terms and conditions of its collective-bargaining agreement with the Union, and because said employees reported to the Union alleged violations thereof by the Respondent, and invoked the assistance of the Union in connection with such alleged violations of the terms and conditions of said agreement, and because said employees made complaints to Respondent concerning their working conditions."

The Trial Examiner found, in effect, that the complaints were voiced by John alone and were not for "legitimate union or concerted aims and purposes" but were for his "own selfish benefit and aggrandizement." We disagree. In the first place, we do not adopt the Trial Examiner's conclusion that John "was really the sole protagonist"; the record shows that William and Collins were also involved in making the complaints. However, even if the complaints were made by John alone, they still constituted protected activity since they were made in the attempt to enforce the provisions of the existing collective-bargaining agreement. The Board has held that complaints made for such purposes are grievances within the framework of the contract that affect the rights of all employees in the unit, and thus constitute concerted activity which is protected by Section 7 of the Act.[7]

[6] All of the complaints were made to President Kleinhans, Superintendent Soebke, or Foreman Koster. Accordingly, we find without merit Respondent's contention that it had no knowledge of the complaints.

[7] *New York Trap Rock Corporation, Nytralete Aggregate Division,* 148 NLRB 374; *Merlyn Bunney, et al., d/b/a Bunney Bros. Construction Company,* 139 NLRB 1516; *Morrison-Knudsen Company, Inc., et al.,* 149 NLRB 1577. Although it appears that these complaints were meritorious, we need not decide that question here since, as the Board has previously held, "the right of employees to press complaints does not depend on either the employer's or the Board's appraisal of the merit of the employees' complaint" and "is irrelevant to the question of whether employees are engaging in protected con-

Therefore, if the Landers were discharged for making these complaints, such discharges were violative of Section 8(a)(1).[8] The Trial Examiner found, however, that "Respondent in fact did discharge the Landers brothers because of their failure to give a day's work for a day's pay by repeatedly ceasing work during the stipulated workday even after a warning, and consequently that the discharge of the Landers on April 15 was for good cause." We disagree.

For approximately 3 months Respondent evaded listing the concrete reasons which were allegedly responsible for the discharges. Thus, at the time of the discharges Superintendent Soebke refused to give any reason for his action. About a week later President Kleinhans told a union business agent that he had discharged the Landers for "different reasons," but did not say what these reasons were. On April 27, in response to questioning by a Board agent, Kleinhans refused to give his reasons for discharging the Landers.[9] In Respondent's answer, filed by Kleinhans, to the complaint, Kleinhans stated that the "Landers were discharged strictly in accordance with the working agreement signed by us and the Enterprise Association, Local Union No. 638." In an amended answer filed by Respondent's attorney during the hearing, Respondent stated only that under the collective-bargaining agreement it had the prerogative of "discharging any person whom the employer, in its sole discretion, may deem fit" and that the subject matter of the complaint involved "an industrial grievance rather than a violation of the National Labor Relations Act." In addition to being evasive about the reasons for the discharges, President Kleinhans' and Superintendent Soebke's testimony at the hearing in support of the reasons finally stated for the discharges was not only contradictory but was at variance with earlier statements made by each.

Thus, in his prehearing affidavit, Kleinhans stated that on March 30, it was he who observed the Landers taking a lunch hour from 11:40 to 12:40,[10] and that Soebke never told him that they were taking long lunch hours. At the hearing, he added that on the same day he saw the Landers take a long lunch hour, he told Soebke to keep "an eye" on them. In his April 28 prehearing affidavit, Soebke stated, however,

certed activity." *Mushroom Transportation Co., Inc.*, 142 NLRB 1150, 1158, reversed on other grounds 330 F. 2d 683 (C.A. 3). See also *Socony Mobil Oil Company, Inc.*, 153 NLRB 1244. The fact that the Landers and Collins may have attempted to obtain an "8-hour day" and "expense money," which were not provided for in the contract, does not change our conclusion herein. See *New York Trap Rock Corporation, supra*, 376, footnote 2

[8] See cases cited in footnote 7, *supra*.

[9] He denied that they were discharged for making complaints and insisted that he was unaware that they had made complaints. As already stated, the record shows that he was aware of the complaints

[10] He also stated that he told them that they were "supposed to have an ½-hour for lunch" but that he "never warned them about their work or the hours they worked" and as far as he knew "nobody warned them about their work or the hours they worked."

that on approximately March 27 and several times later, he told Kleinhans that the Landers were taking "more time for lunch than they should." At the hearing, Soebke, contrary to his prehearing affidavit, stated that it was Kleinhans who first observed and told him that the Landers were taking too much time for lunch. On cross-examination, after being confronted with his prehearing affidavit, Soebke reverted to his earlier statement that it was he who had first observed the Landers taking too much time for lunch.

Kleinhans and Soebke also contradicted themselves and each other with respect to the Landers leaving work early, and also with respect to which one of them initiated the discharge of the Landers.

Thus, in his prehearing affidavit, Kleinhans stated that about April 2, he saw the Landers leave the jobsite at 3:15 p.m.,[11] but that he did not know if they left early after that day and that "Koster and George [Soebke] never told me that they were leaving early." At the hearing, on direct examination, he testified that on approximately April 7, Soebke told him that the Landers and Collins left work about 3:15 p.m. On cross-examination, he stated that Soebke also told him that the Landers left work one day at 3:05 p.m. After being confronted with his affidavit, he stated that he did not know if the Landers left early after the day he saw them leave early (about April 2) and that he didn't know whether he wanted to change his testimony. He then added: "I was fed up with them on general principle, they were not doing any work, not paying attention to lunch hours, coffee breaks and they put in a couple of hours standing in each other's way." [12] Contradicting himself again, Kleinhans also said that 2 or 3 days before April 15 he went to the jobsite and that the Landers and Collins were not there. Soebke testified that he saw the Landers leave early on two or three occasions and that he reported each occasion to Kleinhans.

With respect to the discharges, Kleinhans testified on direct examination, contrary to his prehearing affidavit and part of his cross-examination, that on April 14 he observed that the Landers were not on the jobsite at 3:15 p.m. and that evening he told Soebke to discharge them. Soebke, however, testified that the Landers' discharges resulted from his recommendation that such action be taken after he (rather than Kleinhans) had observed the Landers leave the jobsite at 3:05 p.m. on April 13.

In face of the above contradiction and many others present in the record, the Trial Examiner found:

"The facts here prove: (1) that on at least one occasion, March 30, the Landers were observed by Kleinhans enjoying a lunch period of

[11] The workday was from 8 a.m. to 3:30 p m.

[12] The last statement obviously was a reference to the Landers working together while welding as required by the collective-bargaining agreement.

1 hour or more . . .; that on one occasion the Landers were observed by Soebke leaving the worksite for the day at 3:05 . . .; and (2) on a number of other occasions Soebke had noted the absence of the Landers brothers from the jobsite . . . [at] 3:15 p.m." [13]

In our opinion, this record does not support these facts found by the Trial Examiner. The contradictions as to who first observed the Landers leaving the jobsite early for lunch, whether Soebke or anyone told Kleinhans that the Landers were taking long lunch hours and leaving early, whether Soebke recommended that the Landers be fired or whether Kleinhans simply told Soebke to fire them, and whether it was Soebke or Kleinhans who observed the Landers leaving early the day before they were fired, convinces us that the testimony of Kleinhans and Soebke is not credible.[14]

Without question an employer may lawfully discharge an employee for any reason provided the reason is not conduct protected by the Act. The General Counsel has the burden of proving that the discharge was for an unlawful reason. We believe that the General Counsel proved a *prima facie* case of unlawful discharge by showing that the discharged employees had made complaints about working conditions which were a protected concerted activity, that Respondent was aware of such complaints and resented them, that the discharges were made

[13] The Landers testified that they did not take long lunch hours and that they did not leave work early. Collins corroborated this testimony. In his Decision, the Trial Examiner found that the Landers' testimony that they might have left for lunch not more than 2 or 3 minutes early plus their inability to recall if they ever left work prior to 3:15 p.m. constituted "nothing more than an admission that they were in fact prone to cease work at least 15 minutes prior to quitting time." An admission by the Landers that they might have left for lunch 2 or 3 minutes early does not justify an inference that they left work 15 minutes prior to quitting time. Also, an inference that the Landers left work at least 15 minutes prior to quitting time because they were not able to recall having ever left work prior to 3:15 p.m. is unwarranted and unsupported. Accordingly, we do not adopt this finding or inference of the Trial Examiner. The Trial Examiner also credited the testimony of Kleinhans and Soebke "regarding the March 30 lunch period and the early departures from work by the Landers" because "Johns attempted explanation" had a "hollow ring in light of John's other complaints" and "more importantly," because it was "convincingly denied in this and other respects by John's fellow workman, William Collins." In our opinion, the fact that John made complaints about working conditions cannot be used as a basis for finding his testimony with respect to another matter not credible or for finding contrary testimony of another witness credible. Secondly, as previously stated, Collins corroborated John's testimony in this and other respects. Since the Trial Examiner based this credibility finding upon an unwarranted inference and an incorrect fact, we do not accept it. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3).

[14] Since the credibility findings of the Trial Examiner were not based on demeanor, we do not accept them. Even if they were based on demeanor, we would still not accept them in view of the contradictions noted above and the fact that the record evidence as a whole does not support them, *Standard Dry Wall Products, Inc, supra.*

We also specifically disavow the following inferences that may be drawn from the Trial Examiner's Decision:

(a) Section III, B, second paragraph, where the Trial Examiner seems to imply that a wrongful motive may be imputed to an employee when such employee seeks a better paying job; and

(b) Section III, B, eighth paragraph, where the Trial Examiner infers that a wrongful motive may be imputed to an employee when such employee has sought legal advice at a Regional Office of the Board

soon after the complaints were registered, and that Respondent contemporaneously refused to give a reason for the discharges to the discharged employees. These facts warrant the inference, unless rebutted, that the complaints were the reason for the discharges. At the hearing, Respondent did offer evidence which, if accepted, would establish that the motivation for the discharges was for cause. However, as set out above, this proffered evidence is so contradictory as to be unworthy of belief.[15] Under these circumstances, we find, contrary to the Trial Examiner, that Respondent discharged the Landers because they had engaged in protected concerted activity and by so doing violated Section 8(a)(1) of the Act.[16]

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It has been found that the Respondent discharged John and William Landers in violation of Section 8(a)(1) of the Act. Although it is almost certain that the New York Telephone project on Tratman Avenue has already been completed, it is possible that unforeseen delays may have occurred which have prevented completion. Therefore, the following order for affirmative action is made in the alternative.

In the event that the project has not yet been completed, we shall order that the Respondent offer William and John Landers immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of this discrimination against them by payment to them of a sum of money equal to that which they would have earned as wages from the date of reinstatement, less their net earnings during such period, in accordance with the formula prescribed in *F. W. Woolworth Company*, 90 NLRB 289, together with interest on such sum, such interest to be computed in accordance with the formula prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

In the event the project has been completed, we shall order that the foregoing be modified to the following extent: The Respondent need not offer reinstatement to William and John Landers but shall instead

[15] Even if we were to find that John and William took long lunch hours and left work early, we would still find that the discharges were unlawful upon the ground that these were not the real reasons why they were discharged. The testimony of Kleinhans and Soebke, if accepted, indicates that Collins, except for one time, was as guilty as the Landers in taking long lunch hours and leaving early, yet he was not discharged. Moreover, Kleinhans testified that Soebke told him it was "standard practice for steamfitters to leave a few minutes early."

[16] In view of the fact that the remedy would be the same, we find it unnecessary to determine whether the discharges also violated Section 8(a)(3) of the Act.

send a letter to each stating that, notwithstanding their discharges, they will be considered eligible for employment in the future at any of the Respondent's projects if they should choose to apply for employment at any of them.[17] In addition, Respondent shall include in the letters to William and John Landers copies of the notices which would otherwise have been posted if the project had not been concluded. Also, Respondent shall mail copies of the notice to all of its employees employed by the Respondent at the New York Telephone Company project on April 15, 1965.

CONCLUSIONS OF LAW

1. Interboro Contractors, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The evidence adduced herein establishes that John and William Landers were discharged on April 15, 1965, in violation of Section 8(a)(1) of the Act.

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Interboro Contractors, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees or otherwise discriminating in regard to their hire, tenure of employment, or any term or condition of employment, because they have engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in, or to refrain from engaging in, any or all of the activities specified in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

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

(a) In the event the Respondent's operations at the New York Telephone Company project on Tratman Avenue are still in progress,

[17] This does not mean, however, that Respondent is required to offer William and John Landers employment at other projects; Respondent is only to consider them for employment on a nondiscriminatory basis. See *Bechtel Corporation*, 141 NLRB 844, 845, footnote 2.

offer to William and John Landers immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss he may have suffered by reason of his discharge in the manner and to the extent set forth in the section entitled "The Remedy."

(b) In the event the Respondent's operations at the New York Telephone Company project on Tratman Avenue have been completed, make whole William and John Landers for any loss of pay they may have suffered by reason of their discharges and assure them of their future eligibility for employment by the Respondent in the manner and to the extent set forth in the section entitled "The Remedy."

(c) Notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports and all other records necessary or useful to determined the amount of backpay due under the terms of this Order.

(e) In the event that the Respondent's operations at the New York Telephone Company project on Tratman Avenue are still in progress, post at said project copies of the attached notice marked "Appendix." [18] Copies of said notice, to be furnished by the Regional Director for Region 2, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, and remain posted as long as operations on the New York Telephone Company project are in progress, but for a period of no longer than 60 consecutive days from the date of posting, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) In the event the Respondent's operations at the New York Telephone Company project on Tratman Avenue have been completed, mail copies of the aforesaid notice to the employees specified in the section entitled "The Remedy."

(g) Notify the Regional Director for Region 2, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

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

MEMBER ZAGORIA, dissenting:

I am not persuaded that John and William Landers were discharged for reasons prohibited by the Act. I would therefore adopt the Trial Examiner's Decision.

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT discharge any of our employees or otherwise discriminate in regard to their hire, tenure of employment, or any term or condition of employment, because they have engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to engage in, or to refrain from engaging in, any or all of the activities specified in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer John and William Landers immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, if we have not completed operations at the New York Telephone Company project on Tratman Avenue.

WE WILL, in the event that the New York Telephone Company project on Tratman Avenue has been completed, assure John and William Landers that they are eligible for future employment by us.

WE WILL make John and William Landers whole for any loss of pay they may have suffered by reason of the discrimination against them.

INTERBORO CONTRACTORS, INC.,
Employer.

Dated_____ By_____
(Representative) (Title)

NOTE.—We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted at said project as long as operations on the New York Telephone Company project on Tratman Avenue are in progress, but for a period of no longer than 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Fifth Floor, Squibb Building, 745 Fifth Avenue, New York, New York, Telephone No. 751–5500, if they have any question concerning this notice or compliance with its provisions.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon charges signed by William and John Landers, as individuals, on April 20, 1965, the General Counsel of the National Labor Relations Board, hereinafter called the General Counsel [1] and the Board, respectively, by the Regional Director for Region 2 (New York City, New York), issued its complaint dated May 25, 1965, against Interboro Contractors, Inc., hereinafter called the Respondent. The consolidated complaint alleged that Respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) by discharging John and William Landers on April 15, 1965, "because said employees insisted upon the full performance by Respondent of terms and conditions of its collective-bargaining agreement with the Union, and because said employees reported to the Union alleged violations thereof by the Respondent, and invoked the assistance of the Union in connection with such alleged violations of the terms and conditions of said agreement, and because said employees made complaints to Respondents concerning their working conditions."

Copies of the charges, consolidated complaint, and notice of hearing thereon were duly served upon Respondent and the Charging Parties.

Respondent filed two answers: The first over the signature of John Kleinhans, president of Respondent, denied the gravamen of the offense alleged and ended with the following two paragraphs:

> These men were hired and discharged strictly in accordance with the working agreements signed by us and the Enterprise Association, Local Union #638.
>
> There is absolutely no basis for their complaint.

And the second was filed during the hearing after the employment of its counsel which admitted certain allegations of the complaint but denied the commission of any unfair labor practices.

Pursuant to notice, a hearing thereon was held at New York City, New York, on July 6, 7, 8, 9, 13, 14, and 15, 1965 before Trial Examiner Thomas S. Wilson. All parties appeared at the hearing, were represented by counsel, and were afforded full opportunity to be heard, to produce, examine, and cross-examine witnesses, and to introduce evidence material and pertinent to the issues. Oral argument at the conclusion of the hearing was waived. Briefs have been received from General Counsel and Respondent on August 30 and September 1, 1965, respectively.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The complaint alleged, the answers admitted, and I find that Interboro Contractors, Inc., is, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of New York and is an employer engaged in commerce within the meaning of the Act.

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[1] This term specifically includes the attorneys appearing for the General Counsel at the hearing.

II. THE LABOR ORGANIZATION INVOLVED

Enterprise Association of Steam, Hot Water, Hydraulic, Sprinkler, Pneumatic Tube, Ice Machine and General Pipe Fitters of New York and Vicinity, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, herein called the Union, is a labor organization admitting to membership employees of Respondent.

The Union filed no charges in this matter.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The facts*

In the latter part of 1964, Respondent entered into a subcontract to furnish and install heating and air-conditioning amounting approximately to the sum of $310,000 during the alteration of an existing building and the construction of an addition thereto for the New York Telephone Company. Work by Respondent commenced in December 1964, and was scheduled for completion in June 1965.

Respondent operates its construction work under the terms of the standard collective-bargaining agreement of the Union.[2]

Sometime in February 1965, John Landers, hereinafter referred to as John to distinguish him from his brother who will be hereafter referred to as William, began a series of telephone calls to Respondent seeking employment with Respondent for himself and William on the Telephone Company building job. During the first such effort John inquired if the job was an "8-hour job" and would pay "expenses." [3] President John Kleinhans was vague and noncommittal on both items.

The final telephone call in this series came on March 23 when Kleinhans told John to report for work at the Telephone building with William on Thursday, March 25. He remained indefinite regarding the 8-hour job and expenses.

On March 25 John and William arrived at the jobsite about 7:30 a.m. and proceeded to the boilerroom where, about 7:50 a.m., they met and began talking to Tony Novak who admitted to being an employee of Respondent. Novak explained the absence of a foreman on the ground that Foreman Frank Foster was a sick man and had been absent from work for the past 3 days. John immediately asked if Novak had called the Union in order to secure a partner for himself in Koster's absence, and inquired if he had reported the job to the Union and the name of the union business agent in the area and if such business agent had ever visited the jobsite. Because of Novak's unsatisfactory replies to these questions and the manner in which Novak was attired, John became suspicious and asked Novak if he were an "A man" [4] to which Novak answered that he had "a book" at home. John promptly demanded that he produce the book the following morning.

When George Soebke, Respondent's superintendent over all of its jobs, appeared at the jobsite about 8:30 or 9 a.m. and introduced himself to the Landers, John complained that they had not been met by President Kleinhans and inquired of Soebke about the 8-hour job and expense money that, as John testified, "might have been promised me" by Kleinhans. Soebke denied having any information thereon. Soebke

[2] At the hearing General Counsel was able to produce contracts containing the signature of Respondent thereon but none executed by the Union At the hearing, but not in its brief, Respondent contended that under these circumstances no valid collective-bargaining agreement existed between the parties However, as both Respondent and the Union considered themselves bound by this standard agreement and purported to operate in accordance with its terms, I find that the technical omission of the Union's signature thereon, though deplorable and extremely careless, is immaterial to the instant matter.

[3] The Union's standard contract provides for a 7-hour workday beginning at 8 a.m. and ending at 3:30 p m with a one-half hour lunch period from 12 noon to 12:30 p.m. The term "8-hour job" thus refers to a job from 8 a m. to 4:30 p m. with 1-hour work at double time. The term "expenses" refers to a rate of pay over and above that provided for in the agreement These are both financial increments sometimes added to the wage rates particularly when competent pipefitters happen to be in short supply which, as John testified, was not the case at this period of time. They are, as John also admitted, "not called for . . . by the contract."

[4] Local 638 is a sort of dual entity being composed on the one hand by journeymen steamfitters or pipefitters known in the common parlance of the Union as "A men" and on the other hand of service mechanics performing light installations of various kinds known commonly as metal tradesmen or "B men." Local 638 keeps the A and B men completely separated even to the extent of having them work under separate collective-bargaining agreements.

thereupon explained the layout of the work to be done to the Landers during which time John testified that he "initially found out about the prefabricated boiler" scheduled to come to the jobsite. Soebke then assigned John to do some welding and William to put some hangers on the ceiling, both in the same boilerroom area. At this point John refused saying, "No good. We don't work separately . . . aren't you familiar with our contract?" When Soebke suggested the job did not call for two men, John answered, ". . . that's your judgment. The contract calls for us to work together in the same job assignment." Despite Soebke's contrary idea, John refused to work unless both Landers worked on the same job assignment. During this argument John called attention to the fact that Novak had been working 4 days without a partner and that he had grave doubts that Novak was an "A man" and then added "there is something wrong on this job . . . I am going to call the Union to get a business agent down here to straighten this job out." Finally, Soebke assigned both Landers to welding and left the jobsite.[5]

About 9:30 a.m. John left the jobsite and called the Union from a telephone across the street in a candy store and requested that a business agent visit the jobsite.

Koster reported for work on March 26 whereupon John complained to him that Soebke had attempted to work the Landers singly the day before, that Novak had been forced to work alone for 4 days due to Koster's illness whereas a telephone call to the Union would have gotten him a partner, and further inquired why there was not somebody on the job to replace Koster as foreman during his sicknesses. Becoming suspicious of Koster due to some of his replies, John asked to see Koster's union book and thereafter complained that Kleinhans had not met the Landers on the job. John also informed Koster that he, John, had called the Union about these complaints of his.

On the morning of March 29, Business Agent Walter Gould appeared at the jobsite in response to John's telephone call of March 25. John promptly apprised him of his complaints about the job: (1) Novak was not an A man but only a B man; (2) Novak had worked for 4 days without a partner; (3) the job had not been reported to the Union; (4) the union steward had not been briefed by the union executive board; (5) the Landers had been ordered the first day to work separately; (6) a "prefabricated" boiler was scheduled to be installed; and (7) he had doubts that Koster was an A man.[6]

Gould thereupon walked over to Koster, ascertained that he was an A man, and then informed Koster that the men were to work in pairs and not separately in accordance with the terms of the contract, that he would return Novak to the shop because Novak was a B man, and that he would replace Novak the next morning with an A man. Gould also ordered Koster, as the union steward, before the executive board of the Union in order to be briefed on the job and told him that, if and when a "prefabricated" boiler arrived on the job, Koster was to call the Union to have that equipment inspected. Having thus satisfied all of John's current complaints satisfactorily, Gould left the jobsite.

When informed later that same day that Gould had ordered Novak off the Respondent's job and would replace him the following morning with an A man, Kleinhans queried Gould's authority privately but made no outward objection.

Later that same day when Koster told John that he would be welding for the next few days, John requested that Respondent supply him with protective leather welding equipment.[7] Koster agreed to order this protective equipment and thereafter maintained that he had done so whenever John thereafter reiterated his request.

Respondent delivered such leather protected equipment to the jobsite within the next day or two. John acknowledged that one set of such equipment was present at the jobsite but maintained that it had not been delivered to him and that it was used exclusively by William Collins, the A man Gould had sent to the job to replace Novak on March 26.[8]

On Monday, March 29, Novak was replaced on Respondent's job by William Collins, another A man. Koster so informed Kleinhans. Kleinhans was not pleased but made no overt objection thereto although Koster informed John that Kleinhans

[5] Foreman Koster did not report for work that day because of illness.

[6] So far as this record shows John did not complain that the Landers had been promised an "8-hour day" or "expense money."

[7] The union contract provides that the Employer "shall furnish the fitter all the necessary tools . . . ." Whether the word "tools" includes leather protective clothing need not be decided here.

[8] However, Collins denied having used the equipment although he also knew it was on the jobsite.

wanted Novak back on the job. John pointedly reminded Koster that the decision was that of Business Agent Gould. However, Collins remained on the job without objection and Novak never returned.

About 11 a.m. on March 30, Kleinhans came to the jobsite. Koster pointed him out to John. Thereupon flanked by William, Collins, and Koster, John approached Kleinhans, mentioned Kleinhans' failure to meet the Landers on the job on March 25, "reminded" Kleinhans that Kleinhans had "promised" an 8-hour job and expense money during their prehire conversation, and inquired if "they" were going to get them.[9] Kleinhans answered that he could see no reason for 8 hours or expense money at that time but might consider them later. John, annoyed, asked, "What the hell he [Kleinhans] promised the job for [in] the first place and brought us to the job to work." Kleinhans turned on his heel and departed without answering.[10]

Kleinhans had not left the jobsite. At 11:40 a.m. he vainly sought to locate the Landers. They were not at the jobsite. He saw them returning from lunch at 12:40 p.m. Kleinhans spoke to John about the fact that the men took 1 hour for lunch whereas the lunch period was from noon to 12:30 p.m. According to the testimony of John, John denied having spent an hour at lunch with various excuses as to why Kleinhans had been unable to find them on the job at 11:40 a.m.

The Lander's first payday for Respondent was on Friday, April 2, when Superintendent Soebke paid the employees in cash for the work they had performed through Tuesday, as was the longstanding custom in Respondent's operations. In counting their cash John, William, and Collins discovered that their pay was short by 1 day's wages.[11] John objected to Soebke that he, his brother, and Collins were 1 day short in their pay under the terms of their contract. After Soebke stated that this was Respondent's customary method of paying throughout its operations, John said, "I find that rather hard to believe that [Respondent] was following this practice, but still I insisted that we get the day's pay. It was due and I wanted it, my brother wanted it and Collins wanted it." After Soebke again mentioned the bookkeeping inconvenience and Respondent's customary practice of paying through Tuesday night, John threatened "to wait at the jobsite at double time until the day's pay was forthcoming from [Soebke], and if we didn't get a promise of the day's pay, I was going down and contact the local union." Soebke agreed to bring them their day's pay on Monday and the men finally left the jobsite. Soebke fulfilled his promise on Monday.

Thereafter Respondent's paychecks were all figured in accord with the Wednesday night provision of the contract and so there were no further complaints regarding the pay.

About 9 a.m. on April 7 a Preferred Utilities boiler and a Carrier refrigeration machine arrived at the jobsite by truck. About 2 p.m. under the supervision of a Telephone Company engineer the boiler was hoisted by crane and lowered through a hole in the floor of building to the basement for placement in the boilerroom. The boiler was, according to John, "completely prefabricated" with oil still dripping from the connections after having been test run at the factory as required by the specifications. That afternoon John inquired of Foreman Koster if he intended to call the Union about the presence of this "prefabricated" boiler.[12] Koster answered, "No, that this (boiler) was alright," whereupon John, acknowledging that he had some question in his mind as to whether the boiler in question constituted a "prefabricated" boiler, stated that he then was going to call the Union.

The next morning between 9 and 9.30 John left the jobsite and telephoned the Union from the candy store across the street requesting that a business agent visit the jobsite "as soon as possible" because of the presence of this "prefabricated" boiler.

Despite this and other later telephone calls made from the same candy store, all of which John reported to Koster, no business agent of the Union ever visited the jobsite in regard thereto.

The next 2 days were spent in rolling the boiler and refrigeration unit, each weighing approximately 8 tons, into position some 25 or more feet from the spot to which they were lowered in the basement. In this endeavor the men used a half-ton block

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[9] There is no evidence in this record that any such alleged "promise" had ever been made to Collins.

[10] Kleinhans denied having made any such promises to John. I credit this denial particularly in view of the fact that admittedly this was a case of the man seeking a job and not of an employer seeking a pipefitter.

[11] The contract specifically calls for the Friday payment of wages due through the previous Wednesday night rather than through Tuesday as was Respondent's custom.

[12] The collective-bargaining agreement contains a provision against the prefabrication of boilers with pipes of 4 inches or more in diameter

and tackle and 2-inch pipe for rollers. John complained that the pipe rollers were not "perfectly round" and that "standard equipment" for such work would consist of 3- or 4-inch hardwood rollers and a couple of 2-ton chain blocks.[13]

In the later afternoon of April 15, Respondent's employees finally succeeded in getting the boiler onto its final resting place on a 2-inch concrete base. At or about the same time Soebke appeared at the jobsite, announced to the Landers that he had their money for them, and was paying them off. When John asked for the reason for their layoff, Soebke said that he had no reason but was merely carrying out his orders. Thereupon John stated, "There must be a reason for a layoff. The custom when you are laid off, you are given the reason."[14] Soebke thereupon merely reiterated his prior statement. Thus ended the Landers' employment with Respondent.

Alerted by his lunchtime experience with Landers on March 30, Kleinhans warned Soebke to keep his eyes on the Landers. Following these instructions whenever he happened to be at the Telephone building, Soebke noted, and duly reported to Kleinhans, that on one occasion he observed the Landers leaving work at 3:05 p.m. and on several subsequent afternoons noted the absence of the Landers from the jobsite around 3·15 p.m. the last such report being made to Kleinhans only a day or two before the boiler was finally placed in position. On April 15, Kleinhans ordered the dismissal of the Landers. Soebke carried out this order as found above.

On April 20, both John and William, as individuals, filed charges against Respondent because of their discharges with the Board's Regional Office. The Union filed no such charges.

On the following day Business Agent Murray of the Union asked Kleinhans why the Landers had been laid off and requested their reinstatement. After informing Murray that he had his own reasons therefor and would not take the Landers back, Kleinhans mentioned the fact that he had received notice from the Board of the charges filed by the Landers. Thereupon Murray said, "Well, that leaves me out."

B. *Conclusions*

The present is not, as Judge Hutcheson has so often had occasion to remark in his opinions in the past, "the usual Labor Board case."

This is the case of John Landers,[15] a young man approximately 18 years in the trade and a like number of years as a member of the Union, soliciting employment from Respondent while already employed for no reason apparent on this record other than the expectation that somehow he would thereby be able to increase his hourly rate of pay by inducing Respondent to employ him on an overtime "8-hour job" plus "expenses" basis.

About 2 months thereafter John finally succeeded in securing the desired employment with Respondent albeit without the overtime and without the expenses.

Then commencing about 10 minutes before he and William actually went on Respondent's payroll, John suddenly became an ardent and vocal union man, demanding to see the union books of his soon-to-be fellow employees, ferreting out violations or, as aptly phrased in the complaint, "alleged violations" by Respondent of the terms and conditions of its existing collective-bargaining agreement with the Union, demanding that Respondent comply strictly not only with the literal terms of that agreement but even with John's own interpretation of such terms and conditions, criticizing numerous other phases of Respondent's operations which admittedly were not covered by that agreement, and proclaiming for all to hear that he, John Landers, was going to get a business agent on Respondent's jobsite "to straighten out the job" and, in fact, successfully doing so once although his numerous subsequent calls to the Union were unsuccessful.

It can be said without fear of contradiction that General Counsel proved that John's campaign of superunionism continued unabated throughout his short employment history with Respondent, despite the fact that Respondent cheerfully and quickly complied with all of his valid complaints and demands to such an extent that by April 15 his gripes had been reduced to such claims as that Respondent was not fur-

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[13] Admittedly the union contract contains no provisions covering the above situation "Standard equipment" for such a job is in dispute—but I do not believe this dispute need be resolved

[14] The transcript shows these two sentences within the same quotation marks as one complete statement made by John. As such, my ruling sustaining Respondent's objection to the "custom" referred to in the answer is erroneous and is hereby reversed.

[15] The record here shows that John Landers was really the sole protagonist and that Williams' participation in the events at issue here was limited to that of a silent follower and onlooker, albeit perhaps a sympathetic one.

nishing him with "standard equipment" for moving the boiler and that the pipe used as rollers in that operation was not "perfectly round," the first complaints he had had to make without the veneer of unionism about them.

It is significant that, despite John's numerous calls to the Union for assistance on the well-publicized matter of the "prefabricated boiler," no union business agent ever bothered to check out John's claim that this boiler constituted a violation of the Union's contract. In fact the testimony of Kleinhans that numerous similar Preferred Utility boilers had been installed in the New York area without objection from the Union remained uncontradicted. In other words the Union's obvious disinterest in John's almost innumerable complaints, after Business Agent Gould's one and only visit to the jobsite, indicates that the Union at least could perceive no matter of union significance in those complaints. Likewise the apathetic attitude of the other employees on Respondent's job, with a possible exception of brother William, indicates further that the employees themselves were unable to perceive any significance of a concerted nature in John's gripes. This dearth of interest by the Union and by his fellow employees failed, however, to deter or quiet John.

The fact that, despite this clear lack of interest by the Union and his fellow employees, John continued this campaign more blatantly, if anything, than previously indicates he had a motive therefor over and beyond that of either union or concerted action.

On this point the record indicates that John's alleged union enthusiasm may have been of rather recent vintage as it proves that about 1960 John had filed charges, later dismissed by the Regional Office, against this same Union during a strike and that thereafter John had been a not infrequent visitor at the Regional Office seeking legal advice. It is a reasonable inference that from these discussions at the Regional Office John had learned of the compensating features of a backpay award which ordinarily follows a discriminatory discharge. This information may well have accounted both for the suddenness and the blatantcy of John's campaign on Respondent's job. It almost seems that John's research at the Regional Office had uncovered for him a means of earning a living easier and more pleasant than working for it.

From this point of view the more noisy and blantant this campaign of superunionism became the better. It would either result in inducing Respondent to increase his hourly wage rates via the 8-hour job plus expenses or else in his being discharged discriminatorily because of "his union activities" with its concomitant backpay award.

However, even assuming that Respondent had discharged the Landers "because" of John's allegedly union activities as alleged in the complaint, I would have to dismiss this complaint on the basis that John's activities were so patently not for any legitimate union or concerted objective but were instead so obviously for his own personal selfish benefit and aggrandizement that his discharge would not, could not, in fact did not, and was never intended by Respondent to either encourage or discourage membership in the Union or in any other labor organization and thus was not within the contemplation of Section 8(a)(3) of the Act.

In making the above statement, I am cognizant of a number of Board cases, some of quite recent vintage, where the Board has found discharges of employees and/or union stewards to have violated Section 8(a)(3) where employers have effected those discharges because they felt that the dischargees had been overly militant, overzealous, or obstreperous in their attempts to enforce the terms of a union collective agreement. These cases are inapposite here for in each of them the dischargees had been pursuing legitimate union or concerted aims and purposes. The same is not true here.

However, as indicated, there is a much clearer and less argumentative reason than the above why this complaint must be dismissed.

The facts here prove that. (1) On at least one occasion, March 30, the Landers were observed by Kleinhans enjoying a lunch period of 1 hour or more, whereas the contract provides for a lunch period of one-half hour from noon to 12:30 p m.; (2) on one occasion the Landers were observed by Soebke leaving the worksite for the day at 3:05 p.m., whereas the work on 7-hour jobs, such as Respondent's, ends at 3 30 p.m.; and (3) on a number of other occasions Soebke had noted the absence of the Landers brothers from the jobsite from on and after 3:15 p m.

While the Landers both denied having taken as much as an hour for lunch or having left work as early as 3·05 p.m. the remainder of their testimony to the effect that occasionally they might have left for lunch not more than "2 or 3 minutes" before noon together with their inability "to recall" having ever left work prior to 3:15 p.m. constitutes nothing more than an admission that they were in fact prone to cease work at least 15 minutes prior to quitting time, even as Soebke had testified.

John's further attempted explanation of this fact to the effect that he and William were only following the lead of Foreman Koster when they changed clothes before leaving at the end of the day and that all the pipefitters always left work for lunch and at the end of the day in a group not only has a hollow ring in the light of the

John's other complaints, but more importantly was convincingly denied in this and other respects by John's fellow workman, William Collins. Accordingly, I must credit the testimony of Kleinhans and Soebke regarding the March 30 lunch period and the early departures from work by the Landers.

From his actions it seems that John considered a collective-bargaining agreement to be a one-way street, to be enforced strictly and literally against the employer, and to be disregarded by the employees with impunity. Such is not the fact nor the law.

A collective-bargaining agreement imposes mutual and reciprocal obligations and responsibilities on the employer and on the employees who accept—or in this case solicit—employment where such an agreement is in effect. The terms and conditions of such an agreement are binding on and enforceable against both sides.

Hence, where an employee fails and refuses to give an employer a day's work as provided under that agreement for the day's pay provided therein—especially where, as here, the employer has warned that employee regarding such default as Kleinhans had to John on March 30—the employer is within his rights in enforcing said agreement by discharging the defaulting employee. Such a discharge would be for good cause.

The evidence here convinces me that Respondent in fact did discharge the Landers brothers because of their failure to give a day's work for a day's pay by repeatedly ceasing work during the stipulated workday even after a warning, and consequently that the discharge of the Landers on April 15 was for good cause. I so find.

RECOMMENDED ORDER

I recommend that this complaint be dismissed in its entirety.

Dye Oxygen Company *and* Transport and Local Delivery Drivers, Warehousemen & Helpers, Local 104. *Cases Nos. 28–CA–1157 and 28–RC–1261. March 31, 1966*

DECISION AND ORDER

On November 22, 1965, Trial Examiner Henry S. Sahm issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices and recommended that such allegations of the complaint be dismissed. In addition, the Trial Examiner found merit in certain objections to the election filed in Case No. 28–RC–1261 and recommended that a second election be ordered. Thereafter, the Respondent, General Counsel, and the Charging Party filed exceptions to the Trial Examiner's Decision and the Respondent and Charging Party filed supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Zagoria].