In the Matter of EDDIE EHRHARDT, ROY WEIR AND MRS. IVY WEIR, CO-PARTNERS, DOING BUSINESS AS VALLEY FRUIT COMPANY *and* LOCAL 35, TEXAS FRUIT & VEGETABLE WORKERS UNION, UCAPAWA-CIO

Case No. 16-C-1022.—Decided December 13, 1944

Mr. Robert F. Proctor, for the Board.

Kelley & Looney, by *Messrs. J. C. Looney* and *Robert J. Enochs*, of Edinburg, Tex., and *Strickland, Ewers & Wilkins*, by *Messrs. Scott Toothaker* and *J. F. Ewers*, of Mission, Tex., for the respondent.

Mr. Otis G. Nation, of Mercedes, Tex., and *Mrs. Elizabeth Sasuly*, of Washington, D. C., for the Union.

Miss Kate Wallach, of counsel to the Board.

DECISION
AND
ORDER

STATEMENT OF THE CASE

Upon an amended charge duly filed on March 20, 1944, by Local 35, Texas Fruit & Vegetable Workers Union, UCAPAWA-CIO, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Sixteenth Region (Fort Worth, Texas), issued its complaint dated March 21, 1944, against Eddie Ehrhardt,[1] Roy Weir and Mrs. Ivy Weir, co-partners, doing business as Valley Fruit Company, Pharr, Texas, herein called the respondent, alleging that the respondent had engaged in and was 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 respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance: (1) that, on or about December 14, 1943, the respondent refused to employ Bernice Hughes and has since refused to employ her

[1] This name appeared in the complaint as Eddie Ehrhart. At the hearing the complaint was amended without objection to show the name as it appears above.

for the reason that she was a member of the Union or because she had engaged in activities on behalf of the Union; (2) that, from on or about December 14, 1943, to March 21, 1944, the respondent vilified, disparaged, and expressed disapproval of the Union and interrogated its employees and prospective employees, orally and through its employment application, concerning their union affiliation; and (3) that, by these acts and statements, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. On April 27, 1944, the respondent filed an answer in which it admitted certain allegations of the complaint as to the nature of its business but denied that it had committed any unfair labor practice.

Pursuant to notice, a hearing was held at Edinburg, Texas, on April 27 and 28, 1944, before John H. Eadie, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were represented and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties.

At the conclusion of all testimony, counsel for the Board moved to amend the complaint to conform to the proof. Counsel for the respondent made a similar motion with respect to the answer. Both motions were granted. The respondent moved to dismiss certain allegations of the complaint for lack of proof, and the complaint as a whole on jurisdictional grounds.[2] Ruling on these motions was reserved by the Trial Examiner, who denied the motions in his Intermediate Report. During the course of the hearing the Trial Examiner made rulings on other motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner made during the course of the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

On July 15, 1944, the Trial Examiner filed his Intermediate Report, copies of which were duly served upon the respondent and the Union, finding that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1) and (3) of the Act, and recommending that the respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Thereafter, on August 7, 1944, the respondent filed exceptions to the Intermediate Report and a brief to support the exceptions. Pursuant to notice and at the request of the respondent, a hearing for

[2] The respondent, in its oral argument before the Board, contended that its employees are agricultural laborers and, as such, are not within the coverage of the Act. This contention is without merit. See, for example, *N. L. R. B.* v *Tovrea Packing Co.*, 111 F (2d) 626 (C. C. A. 9), cert. denied, 311 U. S. 668; *North Whittier Heights Citrus Ass'n* v. *N. L. R. B.*, 109 F (2d) 76 (C. C. A. 9), cert. denied, 310 U. S. 632, rehearing on petition for certiorari denied, 311 U. S. 724.

the purpose of oral argument was held before the Board at Washington, D. C., on November 14, 1944. The respondent and the Union appeared and participated in the argument.

The Board has considered the respondent's exceptions to the Intermediate Report and its briefs, including a brief submitted to the Trial Examiner, and insofar as the exceptions are consistent with the findings, conclusions, and order set forth below, finds them to have merit, and insofar as they are inconsistent therewith, finds no merit in them.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent, Eddie Ehrhardt, Roy Weir and Mrs. Ivy Weir, copartners, doing business under the name and style of Valley Fruit Company, with principal office and packing plant at Pharr, Texas, is engaged in the packing of citrus fruits. The respondent employs about 30 persons at its Pharr establishment. During the 1943 season, the respondent's gross sales of packed citrus products exceeded $800,000, of which approximately 50 percent represented sales and shipments to customers outside the State of Texas.

In its packing operations, the respondent uses raw materials, such as excelsior, paper bags or containers, cotton or mesh bags, lumber, boxes, and related products. Approximately 50 percent of such raw materials is obtained from sources outside the State of Texas. During normal years of operation, the respondent's purchases of raw materials amount to about $50,000 a year.

II. THE LABOR ORGANIZATION INVOLVED

Local 35, Texas Fruit & Vegetable Workers Union, UCAPAWA-CIO, is a labor organization which admits to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. *Interference, restraint, and coercion*

1. The employment application blanks

Bernice Hughes and her husband, Jesse Hughes, applied to the respondent for employment as fruit packers sometime in October 1942, at the beginning of the 1942–1943 fruit-packing season. At that time the respondent's employment application blanks contained the question: "Are you a member of a union—AFL—CIO—." Both applicants stated in writing that they were members of the AFL. They

were offered jobs as fruit packers but declined to accept the offers at that time.

The respondent continued the use of such application blanks containing the question concerning union affiliation until sometime in January 1944, when, at the suggestion of an employee of the Board, it eliminated from its employment application blanks the question concerning union affiliation.

The Trial Examiner found, and we agree, that the respondent's use of the question concerning union affiliation in its employment application form constitutes interference, restraint, and coercion in violation of Section 8 (1) of the Act.

The respondent contends that such alleged violation of Section 8 (1) of the Act falls outside the scope of the complaint since Hughes and his wife had filed their application for employment with the respondent more than a year prior to the time alleged in the complaint as the date when the respondent first questioned its employees concerning union affiliation. The contention is without merit. The respondent did not discontinue the use of the objectionable question until sometime in January 1944. Furthermore, the respondent actually used the form in December 1943, when three women applied for jobs as fruit packers and were furnished with employment application blanks by Foreman Dan Wise.[3] We find that the form of application blank containing the objectionable question with respect to union affiliation was actually used by the respondent in the period alleged in the complaint.

The respondent also contends that it should not be held accountable for the use of such application form for the reason that it has eliminated the objectionable question,[4] and that it did not deny anyone employment as a result of the use of such form. We find the respondent's contentions without merit. We further find the respondent's final contention that it used the application form as a guide in determining an applicant's ability likewise lacking in merit in view of the fact that the questionnaire called for information as to which of two labor organizations the applicant belonged.

2. Statements by Foremen Wise and Eubank

On December 13, 1943, after the beginning of the 1943–1944 packing season, Bernice Hughes applied again to the respondent for employment as a fruit packer. In the interim she had changed her union affiliation from the AFL to the CIO, of which she had become an

[3] These three applicants were not offered jobs thereafter.

[4] See *Consolidated Edison Co* v *N. L. R. B.*, 305 U. S. 197, 230, in which the Supreme Court upheld a Board order barring resumption of employment of "outside investigating agencies" despite the employer's objection that it had discontinued the practice.

officer.[5] She discussed employment opportunities with Dan Wise, foreman of the respondent's orange shed; and Hughes and Wise were later joined in the discussion by Dick Eubank, foreman of its grapefruit shed, and Eddie Ehrhardt, one of the copartners of the respondent.[6]

As to the discussion which ensued, Hughes testified that she was asked by Foreman Wise whether she was a member "of this Union around here," and that, at the same time, Wise stated that he had "instructions from the office not to hire anyone that belongs to the Union." Hughes further testified that, when she answered that she did not belong to that "old Union," and that it no longer had any existence, Wise asked Eubank as to the accuracy of Hughes' statement with respect to the non-existence of the labor organization, and Eubank replied: "Hell, no, they had a big meeting last night." Hughes further testified that she thereupon stated: "Why, you're wrong there, Mr. Eubanks [sic] because we don't have that old Union any more. It's the CIO now;" and that Eubank replied: "That's worse than ever. * * * Some of my best friends belonged to this old Union, but I don't want anybody in here believing in that damned Union around me." Wise and Eubank denied having made the statements attributed to them by Hughes. Ehrhardt testified, in part, that he heard Hughes talk about a union meeting held on the previous night. We credit, as did the Trial Examiner, Hughes' testimony rather than the denial of Wise and Eubank and find that they made the statements substantially as testified to by Hughes. We also find, as did the Trial Examiner, that by such statements of Eubank and Wise, the respondent interfered with, restrained, and coerced its employees in violation of section 8 (1) of the Act.

B. *The alleged discriminatory refusal to hire Bernice Hughes*

In the discussion which took place on December 13, 1943, Foreman Wise told Hughes that he "probably" needed an orange packer and that he "thought" he could give her a job. He also stated that Hughes would need a statement of availability or a release. It is clear that, even if Hughes' testimony as related above is fully credited, Wise did not offer her a job at that time.

On the following day, December 14, 1943, Bernice Hughes accompanied by her husband, Jesse Hughes, returned to the respondent's plant at closing time. According to Bernice Hughes' testimony, she was asked by Wise whether she had a statement certifying that she did not belong to the Union, a statement which Wise, according to Hughes, had requested from her on the preceding day. On direct

[5] Precisely when she became an office holder does not appear from the record It is clear, however that the Union did not come into existence until the early part of December 1943.

[6] Wise has authority to recommend hiring or discharging, Eubank has authority to hire subject to the respondent's approval.

examination Jesse Hughes testified that Wise, on December 14, asked his wife "for a statement." On cross-examination, following a short recess in the taking of the testimony, Jesse Hughes added to his prior testimony the words: "that she did or did not belong to a union." Wise denied that he had requested such a statement either on December 13 or 14. Wise testified that on December 14, Hughes handed him a yellow paper and said: "Here is my release."

The paper, containing a letter bearing the signature of Bernice Hughes and addressed to Wise, purported to review the events which had transpired on December 13, and advised Wise that she was a member of the Union and that a failure on the part of the respondent to hire her would be treated as an unfair labor practice.[7]

Wise read the letter, made some remark,[8] and then took the letter to the respondent's office. About 10 minutes later, Eddie Ehrhardt appeared and told Hughes that the respondent did not need any packers.

Upon substantially these facts, the Trial Examiner found, as the complaint alleged, that the respondent refused to employ Bernice Hughes because of her union activities. We do not agree.

In view of the use of the question concerning union affiliation in the employment application form and in view of the above-mentioned statements of Foremen Wise and Eubank, it may well have been that the conversations with Bernice Hughes contained evidence of intent to discriminate in regard to hire because of her union affiliation. However, we find that the respondent has not actually discriminated in this respect since no job was available for her.

As stated above, in the discussion which took place on December 13, 1943, Foreman Wise told Hughes that he "probably" needed an orange packer and that he "thought" he could give her a job. He also stated that Hughes would need a statement of availability or a release. It is

[7] The letter which had been drafted on December 14, with the aid of a union representative, read, in part, as follows:

> Yesterday I called on you for a job as packer at that plant and during the conversation you inquired as to whether or not I was a member of the CIO or any Union.
>
> You stated further that if I had a release and was not a member of the Union you would hire me I told you the old Union (meaning the AFL) had folded up. About this time Mr. Eubanks walked up and said that Union meetings were still being held and that one had been held yesterday I said that that was the CIO Mr Eubanks then stated "That's worse than ever. I just don't want anybody around me that believes in such things"
>
> You then said: "I have been instructed not to hire any Union packers."
>
> Please be advised that I am now a member and was at that time in good standing with the CIO Please be further advised that I am hereby applying for my job and your refusal to hire me will be construed to mean you are refusing because I am a member of the Union
>
> Your refusal will also mean that we will file unfair labor charges against the company and you as their agent for refusal to hire.
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> You no doubt are familiar with the National Labor Relations Act in regard to this anti-union act; even though you had these orders from your superior.

[8] As to the remark, Hughes testified that Wise asked her "What are you trying to do, put the screws to me"; Wise testified that he asked Hughes whether she was trying to "throw somebody a curve." Since we do not consider either version significant, we make no finding as to what Wise said in this instance.

clear that, even if Hughes' testimony as related above is fully credited, Wise did not offer her a job at that time.[9]

The record further shows that shortly after Hughes applied for a job as a fruit packer, three other women applied. Foreman Wise accepted their applications but none of the applicants was offered a job by the respondent. Thereafter, on or about January 10 or 11, 1944, the respondent employed for a few days a woman packer who had worked for the respondent in previous seasons and who had been promised work upon her return for the 1943–1944 season. Foreman Eubank testified that it was the respondent's practice to engage a full complement of workers at the beginning of a season; that additional help was seldom needed; and that, during the 1943–1944 season, he had not replaced several workers who had dropped employment in the grapefruit shed because there was not enough work available for the remaining employees. Under these circumstances we find that there was no vacancy at the respondent's plant at the time Hughes applied for a job.

Since Hughes was not offered a job either on December 13 or 14, 1943, and since there was no vacancy at the respondent's plant at the time she applied for a job, we find that the evidence does not sustain the allegation in the complaint that the respondent unlawfully refused to employ Bernice Hughes. We shall therefore dismiss the complaint insofar as it alleges that the respondent discriminated against Bernice Hughes within the meaning of Section 8 (3) of the Act. However, in view of the respondent's past practice of unlawfully scrutinizing applicants for employment for possible union affiliation, the respondent is hereby cautioned not to discriminate against Bernice Hughes because of her union activities should she apply for employment with the respondent in the future.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

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[9] The Trial Examiner credited Hughes' testimony that Wise requested a statement that she was not a member of the Union Although the letter presented to Wise purported to contain a full account of the occurrences on the previous day, it does not contain a request for such a statement. Furthermore, such a statement would have duplicated information called for in the employment application blank. We find that Wise did not ask Hughes for a separate statement that she was not a member of a union.

Neither do we believe that Wise changed his mind with respect to employing Hughes when she revealed her union affiliation in the letter presented to Wise on December 14. An attentive listener would have detected the fact of her union affiliation from her statement on December 13, "We don't have that old union any more" and from the knowledge of union activities which she otherwise displayed.

V. THE REMEDY

Having found that the respondent has engaged in unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action, which we find will effectuate the policies of the Act.

We have found that the respondent unlawfully required applicants for employment to supply information on employment blanks as to their union affiliation. The respondent has meanwhile discontinued the use of the objectionable application blank. We shall therefore order the respondent to cease and desist, in the absence of a contract with a labor organization requiring membership therein as a condition of employment, from resuming in the future the practice of requiring applicants for employment to supply information as to their union affiliation by the use of such application blanks or otherwise.

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

CONCLUSIONS OF LAW

1. Local 35, Texas Fruit & Vegetable Workers Union, UCAPAWA-CIO, is a labor organization, within the meaning of Section 2 (5) of the Act.

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

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

4. The respondent has not discriminated with regard to the hire or tenure of employment of Bernice Hughes, within the meaning of Section 8 (3) of the Act.

ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Eddie Ehrhardt, Roy Weir and Mrs. Ivy Weir, co-partners, doing business as Valley Fruit Company, and their agents, successors, and assigns shall:

1. Cease and desist from:

(a) Resuming in the future the practice of requiring applicants for employment to furnish information as to their union affiliation;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 35, Texas Fruit & Vegetable Workers Union, UCAPAWA-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, 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) Post immediately in conspicuous places throughout its plant at Pharr, Texas, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order;

(b) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

AND IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that the respondent discriminated against Bernice Hughes within the meaning of Section 8 (3) of the Act.