

In the Matter of THE TEXAS COMPANY (PUERTO RICO) INC. *and* UNION
DE TRABAJADORES DE LA TEXAS COMPANY TERMINAL DE GUAYANILLA
(C. G. T.)

Case No. 24-C-51.—Decided February 6, 1945

DECISION

AND

ORDER

On November 11, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent filed exceptions to the Intermediate Report and a brief. 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.

Pursuant to notice and at the request of the respondent, a hearing for the purpose of oral argument was held before the Board on January 16, 1945, in Washington, D. C. The respondent appeared and participated in the oral argument. The Union did not appear.

The Board has considered the Intermediate Report, the respondent's exceptions and brief,¹ the oral argument, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner save as they are inconsistent with our findings, conclusions, and order hereinafter set forth.

1. The Trial Examiner found, and we agree, that by Superintendent Dick Brown's statements to employees Adolfo Ortiz, Frank Cales, and Juan Rodriguez Martinez on or about November 5, 1943, and in January 1944, as more fully set forth in the Intermediate Report, in substance advising the employees that union organization brought trouble and was unnecessary and warning them to drop their union

¹ In its exceptions to the Intermediate Report and in its brief the respondent contends that the Board does not have jurisdiction in the instant case inasmuch as the Act has no application to Puerto Rico since Puerto Rico is not a "territory" and is not within the coverage of Section 2 (6) of the Act defining-commerce. For reasons stated in *Matter of Ronrico Corporation and Puerto Rico Distilling Company*, 53 N. L. R. B. 1137, we find no merit in this contention.

activities or risk loss of their jobs, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8 (1) of the Act.

2. We do not agree, however, with the Trial Examiner's conclusion that by discharging Frank Cales and Adolfo Ortiz, as alleged in the complaint, the respondent discriminated in regard to hire and tenure of employment within the meaning of Section 8 (3) of the Act.

Frank Cales became a permanent employee of the respondent at its Guayanilla Terminal in Puerto Rico sometime in 1939. Prior thereto, he had worked for the respondent as a temporary employee for approximately 2 years. During the first 4 or 5 months after becoming a permanent employee, Cales helped in the installation of a pipe line. For the next 4 or 5 months, he hauled drums from the respondent's warehouse to its docks in Guayanilla. Thereafter, he performed various jobs about the respondent's terminal, including work connected with the installation of machinery in its can-assembly plant, until sometime in 1941, when the respondent began operations at that plant. At that time he was given employment as an operator of a squeezer machine in the can-assembly plant.

On January 31, 1944, the date that Adolfo Ortiz was discharged, he had been in the respondent's employ for approximately 3½ years. During the first 4 or 5 months of his employment, he helped lay a pipe line. During the next 7 or 8 months, he helped in the loading of boats at the respondent's docks. In 1941, the respondent transferred Ortiz to work in its can-assembly plant.

The can-assembly plant ceased operations in May 1942; the respondent then discharged 16 of 22 employees who had been working in the plant. Cales and Ortiz were among those retained.² For about 2 or 3 months after the can-assembly plant had closed, Cales and Ortiz performed "odd jobs" at the terminal, including the hauling of drums from the warehouse to the docks and aiding in the loading of ships. Then they were assigned to making metal drum seals.³ Ortiz and Cales were the only persons employed by the respondent at its Guayanilla Terminal in the making of seals at the time of their discharge on January 31, 1944.

About November 1, 1943, Cales and Ortiz had talked to other employees of the respondent regarding the formation of a union; they

² The other four men retained were assigned to guard duty.

³ Brown testified that Cales and Ortiz performed their various jobs "very well;" that he assigned them to the seal-making jobs because they were, in his opinion, the most competent employees to perform that task; that they did not work continuously on the seal job but only when the respondent's stock pile was low; that, when they were not working on the seal job, they performed various other jobs at the terminal; and that, when engaged in performing these other miscellaneous part-time duties, Cales and Ortiz did as good work as other employees engaged in similar work. According to the testimony of Cales and Ortiz, they spent an unstated portion of their time making seals and the remainder performing various other work, such as "measuring tanks, search for rocks to fix the pier, unloading boats, handling empty drums, and painting."

had induced a union representative to help in the organizational drive; and, shortly thereafter, they had held several organizational meetings with other employees during lunch periods and after working hours. The Union received its charter on January 20, 1944, and on or about the same date, Ortiz was elected president of the Union and Cales was elected to the position of "organizer."⁴

On or about January 28, 1944, Superintendent Brown received a letter from H. M. Hanbury, the respondent's manager stationed at its main office in San Juan, advising Brown to discontinue the manufacture of seals at the Guayanilla Terminal, effective January 31, 1944, and authorizing Brown to dismiss the "two employees engaged in this work and * * * so notify them immediately." On January 28, 1944, Brown showed the letter to Cales and Ortiz and notified them that they were discharged as of January 31, 1944.

At the hearing, Superintendent Brown identified eight persons employed by the respondent at the date of the hearing who, at the time Ortiz and Cales were discharged, possessed less seniority than either Ortiz or Cales.⁵ Brown further testified that four of these eight employees were doing work of a nature which Cales and Ortiz could perform, and to which Cales and Ortiz occasionally had been assigned, and were capable of performing equally as efficient as the four named employees. Brown had authority to transfer employees from one job to another at the terminal and frequently exercised that authority.

The respondent contends, and the evidence shows, that the respondent discontinued the manufacture of lead seals at its Guayanilla Terminal because it could import such seals more economically from the United States.⁶ The respondent further contends that discontinuance of such operations necessitated the dismissal of the employees engaged

⁴ In evidence there is a letter dated February 2, 1944, addressed to Superintendent Brown, and bearing the signatures of 38 members of the Union who were employees of the respondent on that date. On January 31, 1944, the date on which Cales and Ortiz were discharged, the respondent employed 40 persons at its Guayanilla Terminal. Thus, all terminal employees were union adherents at the time of the discharges; however, the record does not establish whether the respondent had knowledge of this fact when it discharged Cales and Ortiz.

⁵ The record does not reveal precisely how much more seniority Ortiz and Cales had than these eight other employees. According to Brown's uncontroverted testimony, all other workers had at least 2½ years' service with the respondent at the time Ortiz and Cales were discharged.

⁶ Walter Uhl, acting manager of the respondent's Puerto Rico operations, testified, without contradiction, that the respondent had been compelled to manufacture drum seals at its Guayanilla Terminal for a period of time because of restrictions placed by the United States Government upon the importation of such products into Puerto Rico; that, as soon as these restrictions were lifted, the respondent discontinued manufacturing seals at the terminal since it cost the respondent 50 percent less to import the seals from the United States than it did to manufacture them in Puerto Rico. According to Uhl's further uncontroverted testimony, the respondent had not, at the time of the hearing, resumed the manufacture of seals at any of its Puerto Rico operations.

in that work since there were no other vacant positions available for them.⁷

The Trial Examiner found that, as of January 31, 1944, the date of the discharge of Cales and Ortiz, the respondent had in its employ other employees, concededly having no more efficiency and possessing less seniority, who were performing common labor work of a nature which Cales and Ortiz had been in the past occasionally assigned to do and which they were qualified to perform, and that it was the respondent's established policy in making selection for dismissal that, as between employees having equal ability, "seniority controls;" that it was the respondent's practice to shift employees from job to job as the need arose; and that, in selecting Cales and Ortiz for discharge, rather than two other employees of comparable ability but with less seniority, the respondent departed from its customary seniority policy. Upon the basis of these findings and in view of his further finding that the respondent knew that Cales and Ortiz were the most active members of the Union, coupled with the fact that the respondent had engaged in conduct violative of Section 8 (1) of the Act, the Trial Examiner concluded that the respondent utilized the necessity of reducing its working force, occasioned by the shut-down of the seal manufacturing operations, as a means of discriminating against the two most active protagonists of the Union.

We are of the opinion that the record does not support the Trial Examiner's finding with respect to the character of the respondent's policy as to selection of employees for discharge in the event of curtailment of operations. The only evidence in the record with respect to the alleged seniority policy is the testimony of Acting Manager Uhli and of Superintendent Brown. Uhli testified that . . . "the Company's policy is to retain the ablest employees, those best qualified to do the work" and that ". . . it is only where the ability of two men is the same that [the Company gives] *consideration* to the service record or seniority record of the man involved."⁸ According to Superintendent Brown's uncontroverted testimony, in selecting the six employees retained when the can-assembly plant closed in May 1942, he used his "own judgment" and selected "the best men." Thus, length of service was one factor, and that secondary, at most, to which the respondent customarily gave consideration in reducing its working force.

We also observe that all employees were union members at the time of the discharges. Due to the prevailing economic circumstances, the

⁷ So far as the record shows, the respondent has hired no new employees since Cales and Ortiz were discharged, except for several casuals, temporarily employed in an emergency to assist in the loading of a ship, none of whom worked more than 1 day.

⁸ Italics supplied. Uhli also testified, without contradiction, that, as to seniority, the respondent had no "definite policy."

respondent was impelled to discontinue the services of Cales and Ortiz in the making of lead seals. Although Cales and Ortiz had more seniority than the four other employees, referred to above, the four had service records of substantial length; and, according to uncontradicted testimony, they were performing satisfactory service and had ability comparable to that of Cales and Ortiz. In order to retain Cales and Ortiz in its employment, it would have been necessary for the respondent to discharge two other union members and to give their jobs to Cales and Ortiz. Although the matter is not free from doubt and the circumstances surrounding the discharges give rise to a suspicion of discrimination, under the circumstances herein disclosed, we are not convinced that the respondent's conduct in discharging the two employees engaged in the work to be discontinued rather than severing two other union members to make room for the two union leaders, establishes discrimination within the meaning of Section 8 (3) of the Act.

We shall, therefore, dismiss the complaint insofar as it alleges that the respondent discriminated against Frank Cales and Adolfo Ortiz within the meaning of Section 8 (3) of the Act. However, the respondent is hereby cautioned not to discriminate against Frank Cales or Adolfo Ortiz because of their union activities should they or either of them apply for employment with the respondent in the future.

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

CONCLUSION OF LAW

The respondent has not discriminated with regard to hire or tenure of employment as to Frank Cales or Adolfo Ortiz, 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, The Texas Company (Puerto Rico) Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

In any 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 Union De Trabajadores De La Texas Company Terminal De Guayanilla (C. G. T.), or any other labor organization, to bargaining collectively through representatives of their own choosing, and to engage in concerted activities for the pur-

pose 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 at its plants in Guayanilla, Ponce, and Mayaguez, Puerto Rico, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twenty-fourth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for the Twenty-fourth 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 Frank Cales and Adolfo Ortiz within the meaning of Section 8 (3) of the Act.

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

APPENDIX A

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER of the National Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Union De Trabajadores De La Texas Company Terminal De Guayanilla (C. G. T.), 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. All our employees are free to become or remain members of this union, or any other labor organization.

Dated _____ By _____
(Representative) (Title)

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

INTERMEDIATE REPORT

Messrs. Stephen M. Reynolds and Gilberto Ramirez, for the Board.
Mr. Ryder Patten, for the respondent.

STATEMENT OF THE CASE

Upon a charge duly filed on February 24, 1944, by Union De Trabajadores De La Texas Company Terminal De Guayanilla (C. G. T.), herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Twenty-fourth Region (San Juan, Puerto Rico), issued its complaint dated September 12, 1944, against The Texas Company (Puerto Rico) Inc, 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 charge, accompanied by 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 that the respondent (1) from on or about November 6, 1943, (a) warned its employees against becoming or remaining members of the Union, (b) questioned its employees concerning their union affiliations and activities, and (c) made derogatory statements to its employees about the Union and its leaders; and (2) on or about January 31, 1944, discharged Frank Cales and Adolfo Ortiz, and thereafter refused to reinstate them to their former or substantially equivalent positions, for the reason that they, and each of them, had joined and assisted the Union and engaged in concerted activities with their fellow workers for the purposes of collective bargaining or other mutual aid or protection. On September 22, 1944, the respondent filed an answer denying the commission of the alleged unfair labor practices. The answer admitted, however, the allegations of the complaint as to corporate existence of the respondent and the nature, character, and extent of the business transacted by it, including the allegation that the Union is a labor organization within the meaning of the Act. In addition, the answer affirmatively alleged that Cales and Ortiz were originally hired to do work in the can assembly plant and that in May 1942, the plant ceased operations and that Cales and Ortiz were thereafter continued in the respondent's employ on a temporary basis until they were discharged.

Pursuant to notice, a hearing was held on September 26 and 27, 1944, at San Juan, Puerto Rico, before Howard Myers, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel 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 end of the Board's case, Board's counsel moved to conform the complaint to the proof. The motion was granted without objection. At the conclusion of the taking of the evidence, the respondent's counsel moved to dismiss the complaint for lack of proof. Decision thereon was reserved. The motion is hereby denied. At the conclusion of the hearing, oral argument, in which Board's counsel and counsel for the respondent participated, was heard and is part of the record. The parties were then asked if they desired to file briefs with the undersigned. Board's counsel and the respondent's counsel stated that they would not file briefs.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Texas Company (Puerto Rico) Inc., a wholly owned subsidiary of The Texas Company, is a Puerto Rican corporation, having its principal office and place of business at San Juan, Puerto Rico. It owns and operates plants at Guayanilla Terminal, Ponce and Mayaguez, Puerto Rico, where it is engaged in the receipt and shipment of petroleum products. The bulk of the petroleum products handled at the Guayanilla Terminal plant, the only plant involved in this proceeding, is received from Dutch West Indies, Curacao, and Aruba. About one-third of these products are then reshipped to the San Domingo, St. Thomas, St. Croix, Windward, and Leeward Islands. For the year ending September 1, 1944, the imports, in dollar value, exceeded \$100,000, and the exports exceeded \$100,000.

The respondent does not contest the jurisdiction of the Board.

II. THE ORGANIZATION INVOLVED

Union De Trabajadores De La Texas Company Terminal De Guayanilla (C. G. T.) is a labor organization admitting to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. Interference, restraint, and coercion; the discriminatory discharges of Cales and Ortiz

There is no evidence in the record of any labor organization in the respondent's Guayanilla Terminal plant prior to 1943. On or about November 1 of that year, employees Frank Cales and Adolfo Ortiz spoke to the other employees regarding the formation of a Union; were instrumental in inducing Pascal Saez Corales, an outside organizer of the Union, to help in the organizational drive; and held organizational meetings with their co-workers during lunch hours.

A meeting was held at the home of one of the employees on or about November 4. On the following day, according to the testimony of Ortiz, the following ensued between Plant Superintendent Brown, Cales, and himself:

He [Brown] called us [Cales and Ortiz] a little further away from the place where we were working and he said, "I have received a letter from San Juan¹ and in San Juan they know you are trying to organize. We don't need any union here because I treat you all very well and you receive the proper salary." Then he stated that he had power to fire any one who would begin trying to organize; that he knew that there was a law not prohibiting the workers from organizing, but he stated again that no organization was necessary there.

Q. Is that all?

A. Then he went ahead talking.

Q. Continue?

A. Then he said further that he had belonged to several organizations, union, and that he knew that only trouble was to be expected from the unions. Then he said that he had orders from the company, he had power from the company and orders, to fire any one after giving them two weeks' or a month's salary, accordingly. Then a third person came in and the conversation was ended.

¹The main office of the respondent is located in San Juan. Before Brown may hire or discharge anyone he must receive the approval of the main office.

Brown testified that in the early part of November, he heard rumors regarding the union activities of the men, that around November 5, he spoke to Cales and Ortiz about these rumors, that they admitted the men were organizing, and that he then told Cales "If you are going to join a union I hope you do it the right way" as right now we are all happy here and contented, and as you fellows know, a union, if you don't go into it the right way, always brings trouble." Cales' version of what was said during this conversation, while not as detailed as Ortiz's, is substantially in accord with his. Regarding the testimony of Cales with respect to this conversation, Brown testified as follows:

Q Mr. Cales has testified under oath in this Court that on the date of November 5th, that you said as follows:

"No union was necessary as the Texas Company was treating us well. Up to now we have never had a union. Brown said he could fire any employee. He said there were orders from San Juan to fire any worker and to pay two weeks' salary, referring to the union movements we were having."

Did you make that statement?

A. Not the last statement, no, I did not make that.

Q In other words, the only statement you made, as I understand it, is the statement you have already made that you testified to?

A. That is right.

Ortiz and Cales were honest and forthright witnesses. Brown, on the other hand, was not. It was evident to the undersigned that Brown, while on the witness stand, attempted to withhold the true facts regarding the matters upon which he was being questioned. On occasions, moreover, Brown contradicted himself, on important and pertinent matters.³ The undersigned finds that Cales' and Ortiz's version of what was said during the conversation between Brown, Cales, and Ortiz to be substantially in accord with the facts and that Brown made the statements attributed to him by Ortiz and Cales. This finding is buttressed by the credible testimony of employee Juan Rodriguez Martinez who testified that on November 5, Brown came to where he was working and during the conversation which there ensued quotes Brown as saying: "Juan, I am going to ask you to lay off all that thing with the unions, because the company does not like it" and that he replied that "It is too late because I was already within the union and I could not back out." Martinez further testified that in January 1944, Brown made substantially the same remarks to him that he had made in November 1943. Brown denied that he made the remarks attributed to him by Martinez. For the reasons stated above, Brown was not a credible witness and therefore the undersigned finds that Brown made the statements attributed to him by Martinez. Brown admitted that on November 5, he told Dimas Torres, an employee who has been in the respondent's employ for 18 years, that he had learned that the employees were talking about joining a union. Cales, moreover, testified that on several occasions early in 1943, Brown advised him to resign as president of a union of stevedores because if he continued as president

² Brown said that by "right way" he meant that if a union did come into the plant all the employees should join it.

³ For example, Brown testified that he never discussed the union activities of the employees with Hanbury, the respondent's manager whose offices were located in San Juan. Later Brown admitted that he told Hanbury of the employees' union activities. Brown, moreover, testified that he always discussed with Hanbury all matters of which he thought the respondent should be apprised and that it was his opinion that the unionization of the employees was "a matter that management should be concerned with, or take notice of." It is therefore safe to infer, and the undersigned does infer and finds, that Brown advised Hanbury of the union activities of the men and kept him fully advised as to progress of the Union's campaign.

of that union it "might bring [Cales] bad results as far as [his] relations with the" respondent was concerned.⁴ Brown also admitted that he spoke to Cales several times about his connection with the stevedores union and that he advised Cales to resign as its president and requested him not to conduct the business of that union on the time and property of the respondent. The undersigned finds that Cales' version of the conversation he had with Brown relative to the stevedores union to be substantially correct. The undersigned further finds that Brown's requests, some of which were made after November 1943, that Cales resign as president of the stevedores union were made for the sole purpose of impressing upon Cales that the respondent would not tolerate a union in the plant, and had the effect of serving notice on the employees that the respondent was opposed to unions.

On January 20, 1944, the Union was chartered, Ortiz became its president and Cales became its "organizer"⁵ On January 28, Brown informed Cales and Ortiz that they were to be discharged on January 31, because he had received word from San Juan to discontinue the making of metal seals. On January 31, Cales and Ortiz were discharged. The respondent contended that Cales and Ortiz were hired in 1941 and placed in the can assembly plant which plant closed in May 1942, and thereafter they were retained on a temporary basis to do "odd jobs" and to work on the manufacture of metal seals; that in January 1944, the respondent discontinued the making of these seals; that Hanbury directed Brown to discharge the two employees who were working on the seals; that Hanbury had no knowledge of the union activities and membership of Cales and Ortiz; and that their membership and activities in behalf of the Union played no part in Hanbury's decision to discharge Cales and Ortiz. These contentions, however, are not supported by the record. Cales became a permanent employee of the respondent sometime in 1939. Prior thereto he had worked for the respondent as a temporary employee for approximately 2 years. For the first 4 or 5 months after becoming a permanent employee, Cales helped install a pipe line. For the next 4 or 5 months he hauled drums from the warehouse to the docks. He then performed various jobs about the plant, including aiding in the installation of machinery in the can assembly plant, until sometime in 1941, when that plant began operations at which time he was placed on the squeezer machine. Ortiz testified that he had been in the respondent's employ for approximately 3½ years. For the first 4 or 5 months he helped lay a pipe line. The next 7 or 8 months he spent loading boats at the respondent's docks. In 1941, he was placed in the can assembly plant.⁶ Brown admitted that he selected Cales and Ortiz for the can assembly plant because they were very good workers and that while there they performed their jobs very well. He also admitted that for a period of about 3 months, he placed Cales in charge of the night shift. When that plant closed in May 1942, the respondent discharged 16 of the 22 who worked therein. Cales and Ortiz were among those retained. The four other men retained were assigned to guard duty. For about 2 or 3 months after the can assembly plant closed Cales and Ortiz were assigned to performing "odd jobs" around the plant, including hauling drums from the warehouse to the docks and aiding in the loading of ships. Then they were assigned to the making of metal seals. Brown admitted that he assigned Cales and Ortiz to the seal job because they were, in his

⁴ This stevedores union had no connection with the respondent except that some members thereof were employees of the respondent

⁵ The record does not show the exact date when Ortiz and Cales assumed the offices of president and organizer, respectively

⁶ At the time Cales and Ortiz were transferred to the can assembly department they made out formal application blanks. The latter's application, dated March 10, 1941, states "I have been working for the Company as stevedore for the last 5 years."

opinion, the most competent of all the employees to perform that task. He further admitted that Cales and Ortiz did that job very well; that Cales and Ortiz did not work continuously on the seal job but only when the stock pile needed to be built up; that when they were not working on the seal job they worked on various other jobs throughout the plant; that they were good workers; and that their work was just as good as that of any other worker in the plant. Brown, moreover, admitted that he discussed with Hanbury the union activities that were taking place in the plant and that Hanbury was cognizant of the fact that the employees had, on several occasions prior to November 1943, attempted to organize. Under the circumstances of this case, the undersigned is convinced and finds, that Ortiz and Cales, the most active members of the Union, were discharged because they were members of and active on behalf of the Union, and not for the reasons assigned by the respondent. The respondent, moreover, in selecting Cales and Ortiz for discharge departed from its customary policy. This policy provides that efficiency is generally controlling and that when the efficiency of the employees is the same, then seniority controls. However, when Cales and Ortiz were discharged, there were six other employees, concededly with no greater efficiency and with less seniority than either Cales or Ortiz. Four of these six men perform work of a nature which Cales and Ortiz could do and to which they were occasionally assigned. The record, moreover, reveals that it is the respondent's practice to shift the men from one job to another when the need to do so arises. Notwithstanding this, these four employees were retained and Cales and Ortiz were discharged.

The undersigned finds that the respondent, by the acts set forth above, including Brown's derogatory statements about the Union, his questioning of certain employees about their union activities and affiliations, the discriminatory discharges of Cales and Ortiz, and upon the entire record herein, has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby discouraging membership in the Union.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent, set forth in Section III, above, occurring in connection with its operations as described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce within Puerto Rico and between Puerto Rico and several foreign countries, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the respondent has engaged in certain unfair labor practices, the undersigned will recommend that it cease and desist therefrom and that it take certain affirmative action which the undersigned finds will effectuate the policies of the Act.

The undersigned has found that the respondent has discriminated against Frank Cales and Adolfo Ortiz in regard to the hire and tenure of their employment. He will therefore recommend that the respondent offer Cales and Ortiz immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. He will further recommend that the respondent make whole Cales and Ortiz for any loss of pay they may have suffered by reason of the respondent's discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages during the period from January 31, 1944, the date of the discharges, to the date of offer of reinstatement.

ment, less his net earnings⁷ during said period, including the two weeks' pay in lieu of notice of discharge which was received by Cales and Ortiz from the respondent.

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

CONCLUSIONS OF LAW

1. Union De Trabajadores De La Texas Company Terminal De Guayanilla (C. G. T.) 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 Frank Cales and Adolfo Ortiz, thereby discouraging membership in Union De Trabajadores De La Texas Company Terminal De Guayanilla (C. G. T.), the respondent had engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is 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.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the respondent, The Texas Company (Puerto Rico) Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

Discouraging membership in Union De Trabajadores De La Texas Company Terminal De Guayanilla (C. G. T.), or any other labor organization of its employees by laying off, discharging or refusing to reinstate any of its employees and from refusing to employ any members of the Union herein, or in any other manner discriminating in regard to the hire and tenure of employment or any term or condition of employment.

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

(a) Offer to Frank Cales and Adolfo Ortiz immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;

(b) Make whole Frank Cales and Adolfo Ortiz for any loss of pay they may have suffered by reason of the respondent's discrimination against them by payment to each of them of a sum of money equal to that which he would normally have earned as wages during the period from January 31, 1944, the date of the discharges, to the date of the respondent's offer of reinstatement, less his net earnings during said period and less the two weeks' wages the respondent paid to Cales and Ortiz in lieu of notice of discharge;

⁷ 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.

(c) Post immediately in conspicuous places throughout the respondent's plants in Guayanilla Terminal, Ponce, and Mayaguez, Puerto Rico, 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 for which it is recommended that it cease and desist in paragraph 1 hereof; (2) that it will take the affirmative action set forth in paragraph 2 (a) and (b) hereof; and (3) that the respondent's employees are free to become or remain members of Union De Trabajadores De La Texas Company Terminal De Guayanilla (C. G. T.), and that the respondent will not discriminate against any of its employees because of membership in or activities in behalf of that organization or any other labor organization;

(d) Notify the said Regional Director for the Twenty-fourth Region in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondent has taken to comply therewith.

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

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, as amended, any party or counsel for the Board 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, 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. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. 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.

HOWARD MYERS,
Trial Examiner.

Dated November 11, 1944.