

In the Matter of THE EFFICIENT TOOL & DIE COMPANY and DISTRICT
54, INTERNATIONAL ASSOCIATION OF MACHINISTS

Case No. 8-C-2014.—Decided August 27, 1948

Mr. Richard C. Swander, for the Board.

*Stanley & Smoyer, by Mr. Eugene B. Schwartz, of Cleveland, Ohio,
for the Respondent.*

*Messrs. Nick Charo and Howard Tausch, of Cleveland, Ohio, for
the Union.*

DECISION

AND

ORDER

On August 18, 1947, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled proceeding, attached hereto, finding that the Respondent had not violated Section 8 (1) and (3) of the Act,¹ as alleged in the complaint, and recommending that the complaint against the Respondent be dismissed. Thereafter, the Union filed exceptions to the Intermediate Report.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-man panel consisting of the undersigned Board Members.*

The Respondent's request for oral argument is hereby denied, as the record and the briefs adequately present the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Board has considered the Intermediate Report, the Union's exceptions, and the entire record in the case, and hereby adopts the

¹ The provisions of Section 8 (1) and (3) of the National Labor Relations Act, which the Trial Examiner herein found were not violated, are continued in Section 8 (a) (1) and 8 (a) (3) of the Act, as amended by the Labor Management Relations Act of 1947.

*Chairman Herzog and Members Reynolds and Muddock

findings, conclusions, and recommendations of the Trial Examiner for the following reasons:

1. Witnesses for the Board testified as to certain actions of the Respondent alleged to have violated Section 8 (1) of the Act. This alleged conduct was denied by witnesses for the Respondent. The Trial Examiner resolved the conflict in the testimony in favor of the Respondent and concluded that the Respondent had not violated Section 8 (1) of the Act. We find nothing in the record which would warrant our reversing the credibility findings of the Trial Examiner, who had an opportunity to observe the demeanor of the witnesses.²

2. Although one or two statements which the Trial Examiner found were made by Cecil might in a different context be considered as a violation of Section 8 (1), we are not persuaded that the Trial Examiner's finding that no violation of Section 8 (1) occurred should be reversed under the circumstances.

3. In his discussion of the alleged discriminatory discharges and lay-offs, the Trial Examiner found that there was no evidence of a custom of recalling employees, in or out of order. To this finding the Union excepts. While the record does not conclusively support this particular finding of the Trial Examiner, there is nevertheless sufficient other credible evidence supporting the Trial Examiner's ultimate conclusion that the discharges and lay-offs were not violative of the Act.

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint issued herein against the Respondent, The Efficient Tool & Die Company, Cleveland, Ohio, be, and it hereby is, dismissed.

INTERMEDIATE REPORT

Mr. Richard C. Swander, for the Board.

Messrs. Stanley & Smoyer, by *Mr. Eugene B. Schwartz*, of Cleveland, Ohio, for the respondent

Messrs. Nick Charo and Howard Tausch, of Cleveland, Ohio, for the Union.

STATEMENT OF THE CASE

Upon an amended charge duly filed on April 24, 1947, by District 54, International Association of Machinists, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Eighth Region (Cleveland, Ohio), issued its complaint on May 17, 1947, against The

² *Matter of Lancaster Foundry Corporation*, 75 N. L. R. B. 255.

Efficient Tool & Die Company, Cleveland, Ohio, 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 the amended charge, together with 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) since in or about March 1946, inquired of its employees concerning their membership and activities in behalf of the Union; (2) since April 2, 1946, (a) made disparaging remarks about union adherents, (b) informed the employees that the Union was neither "good nor necessary for the shop," (c) threatened the employees with reduction of the number of working hours if the Union was successful in its organizational campaign, and (d) informed the employees that if the Union continued its organizational campaign the plant would be closed; and (3) on or about April 9, 1946, laid off Edmund Jastal and discharged Joseph Spisak and Joseph Jost, and on or about May 15, 1946, laid off James Takacs, and thereafter refused to reinstate them, because each of them had engaged in concerted activities and assisted the Union and for the further reason "of discouraging membership in the Union."

The answer, duly filed by the respondent on June 10, 1947, admitted all the allegations of the complaint pertaining to the corporate existence of the respondent and the nature and character of the business transacted by it and certain other factual matters, including the allegation that the Union is a labor organization, within the meaning of the Act. The answer denied that the respondent committed any of the alleged unfair labor practices and the allegation that the respondent is engaged in commerce, within the meaning of the Act. The answer affirmatively averred that Spisak and Jost were discharged for cause and that Jastal and Takacs were laid off because of lack of work.

Pursuant to notice, a hearing was held from June 16 to June 19, 1947, both dates inclusive, at Cleveland, Ohio, before the undersigned Trial Examiner, Howard Myers, duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel; the Union by representatives. All parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. At the conclusion of the Board's case-in-chief, counsel for the respondent moved to dismiss the complaint in its entirety for lack of proof. The respondent's counsel moved to dismiss the allegations of the complaint with respect to the discharge of Jost and with respect to Jastal's lay-off. The motions were denied. At the conclusion of the taking of the evidence, Board's counsel moved to conform the pleadings to the proof with respect to minor inaccuracies, such as corrections of misspelled words, typographical errors, and the like. The motion was granted without objection. The respondent's counsel then renewed his motions to dismiss the complaint. Decisions thereon were reserved and are disposed of by the recommendations hereinafter made. Oral argument was waived by all of the parties. The parties were afforded the opportunity to file briefs and/or proposed findings of fact and conclusions of law with the undersigned. A brief has been received from the respondent's counsel.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Efficient Tool & Die Company, an Ohio corporation, has its principal office and place of business at Cleveland, Ohio, where it is engaged in the designing, manufacture, and distribution of tools, dies, jigs, fixtures, and special machinery. The respondent's annual purchases of raw materials, principally steel, aggregating approximately \$100,000, are shipped to its plant at Cleveland, Ohio. During the 12-month period immediately preceding the issuance of the complaint herein, the respondent purchased machinery valued at \$35,000, about 5 percent of which was shipped to the respondent's Cleveland, Ohio, plant from points located outside the State of Ohio. The annual value of the respondent's finished products is more than \$300,000. During the 12-month period immediately preceding the issuance of the complaint herein, approximately \$10,000 worth of finished products were sold and shipped to customers located at points outside the State of Ohio, and approximately \$250,000 or about 80 percent were sold to customers within the State of Ohio, who are themselves engaged in interstate commerce. More than 50 percent of the respondent's Ohio customers are engaged either in the manufacture of products which in turn are sold and delivered to customers located at points outside the State of Ohio, or in the manufacture of tools and machinery which in turn are sold to customers who use them for the manufacture of products which are sold and delivered to persons located at points outside the State of Ohio. The Board has taken jurisdiction of approximately 50 percent of the respondent's Ohio customers.

The undersigned finds that the respondent's operations affect commerce, within the meaning of the Act.¹

II. THE ORGANIZATION INVOLVED

District 54, International Association of Machinists is an unaffiliated labor organization admitting to membership employees of the respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The alleged interference, restraint, and coercion*

The respondent started business in 1928, and since its inception, the credible evidence reveals, it has been the respondent's policy to discharge anyone who, in its opinion, was not a satisfactory employee. Likewise, when it came to layoffs due to lack of work, it is its policy to release those employees whom it thinks less suitable, without regard to seniority. This policy of the respondent, because it affords no job security, was a very disturbing factor to the employees. Early

¹ See *Consolidated Edison Co v N. L. R. B.*, 305 U. S. 197; *N. L. R. B v Famblatt*, 306 U. S. 601; *N. L. R. B. v. Bradford Dyeing Ass'n*, 310 U. S. 318; *Southern Colorado Power Co v N. L. R. B.*, 111 F. (2d) 539 (C. C. A. 10); *N. L. R. B v. Gulf Public Service Co.*, 116 F. (2d) 852 (C. C. A. 5); *N. L. R. B v. Suburban Lumber Co.*, 121 F. (2d) 829 (C. C. A. 3), cert. denied 314 U. S. 693; *N. L. R. B. v. Stremel*, 141 F. (2d) 317 (C. C. A. 10).

in March 1946, several of the employees communicated with the Union because, as Hans Frieden, a former employee, testified, the employees thought they "had better organize . . . before we all [are] . . . laid off."

On March 15, about 5 or 6 of the then approximately 26 employees met with representatives of the Union in a public hall in Cleveland, Ohio. Organizational matters were discussed and membership application cards were given to the respondent's employees. A second meeting was held at the same hall on April 5, which was attended by practically the same employees. Signed membership application cards were handed to the Union's representative who attended the second meeting and shop stewards appointed.

During the period between the first and second meetings, the sponsors of the union movement openly solicited members for the Union in the plant. Likewise discussions were had among the employees in the plant during working hours regarding the merits of the Union. Some employees expressing themselves in favor of, others against, the Union. The record reveals no credible evidence of any interference with the solicitations or with the discussions by any members of the respondent's managerial staff. In fact, no evidence upon which a contrary finding could be made was introduced by Board's counsel. On the other hand, several employees and several former employees testified to certain remarks made to them by William Ellis, who was the respondent's superintendent from July 1945 to June 1946, and by Roy Cecil,² which remarks Board's counsel maintained at the hearing were violative of the Act.

With respect to Ellis, former employee Hans Frieden testified, on direct examination, that one morning either in the latter part of March or early in April, while driving to work with Ellis, he said to Ellis, "I think they are trying to organize the place"; that Ellis then asked "Who do you think it is, Hans?"; that he replied, "Well, I don't know, Bill. I think maybe it is Takacs" and another employee, whose name Frieden could not recall at the time he was

² At the hearing, the respondent contended that Cecil, during all the times material herein, was not a supervisor within the meaning of the Act. In support of its contention, the respondent called as witnesses Frank Libuda, the respondent's president, former Superintendent Ellis, and Cecil. These witnesses testified, in effect, that Cecil was a machinist and had no supervisory power whatsoever. On the other hand, former employee Otto Nikki testified that Cecil had complete charge of the grinding department, that Cecil gave orders to the grinders regarding their respective work; that Cecil assigned various jobs to the grinders, that in the fall of 1945 Cecil telephoned him at his home and informed him not to report for work for 3 or 4 days because there was not sufficient work for all the grinders; and that several days later, Cecil telephoned him to report for work because he (Cecil) "would send Joe Doubeck home and let me work 3 or 4 days." Sal Artino, a former employee, testified that after he was hired on April 2, 1946, Cecil assigned him to the various jobs he performed and gave him orders regarding what jobs to do. Alton Dustin, a former employee, testified regarding the various assignments of work given him by Cecil. Joseph Doubeck testified that he was laid off in the fall of 1945 by Cecil. He further testified that Cecil directed the work of the grinders. Employee James Takacs testified that for the past 2 years or so, Cecil did very little manual work but confined himself to directing the work of the grinders and that Cecil gave him "most" of his orders with respect to his work. All the witnesses who were called by the Board testified that they always considered Cecil the foreman of the grinding department. Regarding his duties in early 1946, Cecil testified that after receiving instructions from Ellis as to what work Ellis wanted produced, he would "in turn [give] the work to the other machine operators as to their ability. . . ." Furthermore, during the various periods when the superintendent position was vacant, Cecil performed the duties of superintendent. The undersigned finds that during all the times material herein, Cecil was, and still is, a supervisory employee and was so regarded by the employees, and that the respondent is accountable for his actions and statements. See *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72.

testifying; and that Ellis then "dropped" the subject. Regarding the above conversation, Frieden testified on cross-examination as follows:

. . . I was telling Mr. Ellis, "I think they are trying to organize the shop."

And Ellis said—Bill came back to me and said: "Who do you think it is, Hans?"

I said, "Maybe it is Jim," and I say "I think Joe, and that other fellow by the name of Bill, the fellow who signed me up." So we would be going along and talking about something else again.

Ellis denied making the statements attributed to him by Frieden. He specifically denied ever discussing the Union or unionization in general with Frieden. Ellis was an honest and forthright witness. Frieden did not so impress the undersigned. Accordingly, the undersigned finds that Ellis did not make the statements attributed to him by Frieden.

Edmund Jastal, who was laid off on April 9,³ testified that either on the day of his lay-off or on the day previous thereto, the following incident took place:

Q. All right. Will you tell us what you and Bill Ellis did? Where were you in the shop?

A. I was working at my machine at the time.

Q. Bill was where?

A. Bill just happened to walk over. It was just after we started working, I'd say, about 9:30, 10:00 o'clock.

Q. Will you tell what happened at that time?

A. Well, right at that time, just when Bill walked over to my machine, Mr. Libuda came out of the office, and he slammed the door pretty hard at that time; because it was heard all around the shop. Bill Ellis just happened to come over to my machine at that time. I said, "It looks like Mr. Libuda is pretty mad this morning."

Bill said, "Yes."

I said to him distinctly, "Well, if he's mad now, what's going to happen after the Union gets in?" Bill didn't say anything to me at the time, because he walked over to his bench. That is where Mr. Libuda was heading for. Bill walked over there. Bill didn't say anything to me at this time.

Trial Examiner MYERS Who was the party that slammed the door?

The WITNESS. Mr. Libuda, the owner.

Regarding the Jastal incident, Ellis testified that on the day he laid off Jastal, the latter said to him, "Frank (Libuda) looks mad this morning"; that he replied, "That's usual"; and that he walked away from Jastal after Jastal said, "He will be madder when the Union gets in here." Irrespective of whether Jastal's version or that of Ellis is accepted as being the correct account of what was said by either of them on the aforesaid occasion, it is manifestly clear that Ellis' remarks cannot be construed as being prohibited by the Act.

With respect to Cecil, Joseph Spisak, who was discharged on April 9,⁴ testified that on either April 7 or 8, Cecil said to him, "I understand we are going to have a union here"; that after replying in the affirmative, Cecil then said, "Well, I know one thing, if we join the Union or if we get into the Union, Frank [Libuda]

³ This lay-off is discussed more fully below.

⁴ This discharge is discussed at length below.

will cut us to 40 hours"; that he replied, "Well, if we can make as much in 40 hours as we are making in 45, it would be O. K., by me." Spisak further testified that during the course of this conversation, Cecil asked him if he were in favor of the Union and that he replied that he was. Regarding this conversation, Cecil testified as follows:

Well, I don't know whether I can give it word for word, but I remember asking him (Spisak) what he thought about the union. And he seemed to think it was a very good idea. I remember the point I tried to bring out to him was the fact that the union possibly would bring things down to 40 hours, and he seemed to think that if you got as much for 40 hours as you got for 45, that was the thing to be concerned about. And my concern was more with what I took home on pay day, rather than what I got for an hourly rate.

Cecil denied that, during the above conversation, he had asked Spisak whether he was a member of the Union. In the main, there is no important difference between Spisak's version and that of Cecil as to what was said by each of them on that occasion. A careful reading of the record with respect to the entire conversation clearly shows that it was evident from Spisak's remarks to Cecil that the former was a member of the Union. This fact, coupled with the unreliability and questionable character of Spisak's entire testimony, leads the undersigned to the conclusion that Cecil did not ask Spisak whether or not he was a member of the Union.

Joseph Jost, who also was discharged on April 9, testified that on the day he was discharged,⁵ he stopped at Cecil's work bench and that the following then ensued:

... "I heard, Roy, you joined the Educational Association, too." He looked up and said, "Who told you that? What for?"

I said, "Well, somebody said so." Then Roy proceeded to enlarge on the subject of unions. He said he knows for sure that the Company would not like a Union. "Well," I said, "That is the Company's privilege." Then he said he knows that wages will not—if wages will be increased on account of joining the Union, the hours will be decreased; and that he, as a wage earner, is concerned with the amount he takes home, not what he gets per hour, or—

Cecil testified that the above conversation took place a day or two before Jost was discharged and that the following was said by each of them on that occasion:

He (Jost) came up and he said, "I understand you joined the Educational Society?"

And I said, "Why, yes."

And he said, "Well, I think it is a good idea if we all join up and then we will have peace like a big family here," and so on.

And then I began to point out, as I did with Spisak, as I have already stated, that it wasn't my interest as to the hourly rate as to what it would be, but what we took home at pay day.

James Takacs, who was laid off on May 15,⁶ testified that on April 5, Cecil asked him if he intended to attend a meeting that evening; that he then asked Cecil to what meeting he was referring because he knew of no meeting scheduled for that evening, that Cecil replied that he referred to the one the Union had

⁵ Jost's discharge is discussed at length below.

⁶ The lay-off of Takacs is discussed at length below.

called for that evening; and that he then said, "No, sir, Roy, I don't have nothing to do with that." Cecil admitted that he asked Takacs whether he intended to attend the Union's meeting but added that he was not interested in whether Takacs intended to attend a union meeting but asked the question solely for the purpose of ascertaining whether Takacs, a member of the respondent's bowling club, intended to bowl that evening, a regular scheduled bowling night. In fact, Takacs attended the Union meeting that night and then met Cecil and the other members of the bowling club at the bowling alleys and bowled with them.

Former employee Sal Artino was first employed by the respondent on April 2, 1946. He obtained his job through Cecil. Artino testified that shortly after being hired, Cecil asked him how he "felt" about the Union and whether anyone asked him to join, and that Cecil also said, "I don't think you would cause us any trouble by joining the Union"; that he "didn't exactly tell (Cecil) that I like the Union"; that on several occasions thereafter Cecil asked him to try to find out what the employees, especially Takacs, thought of the Union; and that he always told Cecil that, "I didn't hear a thing about the Union at all." Artino further testified that about 2 weeks after he started working for the respondent, Cecil assigned him to the machine on which Takacs was working and on several occasions thereafter Cecil requested him to "be friendly with Jimmy (Takacs) and find out his views about different matters in the shop, and who he (Takacs) liked and who he disliked, and find out if he had any dealings with the Union"; and that he always reported to Cecil "that Jimmy didn't mention a word about Unions or fellows or anything else while we were working together." Cecil, while admitting that he had talked with Artino about unions in general, denied that he had ever asked Artino to spy on any employee in order to ascertain who were or who were not members of the Union or that he ever said to Artino that Artino should not cause the respondent "trouble by joining the Union." The record is clear that solicitation was carried on openly in the plant. It is also clear that it was carried on in Cecil's presence. In fact, Cecil admitted that he was aware of the union activities of the employees. Furthermore, Jost, Spisak, Takacs, and Artino testified to the various conversations each of them had from time to time with Cecil. The undersigned, under the circumstances, does not credit Artino's testimony regarding being requested by Cecil to spy upon the union activities of the employees. Cecil did not need any informer; from his own observations he was able to ascertain who among the employees were members of the Union. The undersigned credits Cecil's denials regarding these matters.

The undersigned is of the opinion, and therefore finds, that the contentions of Board's counsel that the remarks made by Cecil to Jost, Spisak, and Takacs are violative of the Act are without merit. The statements were nothing more than an expression of Cecil's own personal opinion. Cecil, whose version the undersigned accepts, did not express any concern about the Union organizing the plant, but was concerned about his own welfare. He was interested only in the amount of "take home pay" he would receive if the Union successfully organized the plant. He did not illegally disparage the Union or any of its officers or members. He made no statement which properly could be construed as coercive. Since Cecil's statement lacked all the elements which the Board and Courts uniformly have held necessary and essential to base a finding that managerial utterances are not protected by the Constitution, it is found that the remarks attributed to Cecil by Jost, Spisak, and Takacs are not such as are proscribed by the Act.⁷

⁷ See *N. L. R. B. v. Reynolds International Pen Company*, 162 F. (2d) 680, decided June 24, 1947 (C. C. A. 7); *N. L. R. B. v. Ross Gear & Tool Co.*, 158 F. (2d) 607 (C. C. A. 7);

Accordingly, the undersigned will recommend that the allegations of the complaint that the aforesaid remarks and activities of Cecil and Ellis were in contravention of the Act be dismissed.

The complaint also alleged that the respondent, through its president, Frank Libuda, on or about April 9, 1946, informed its employees that if the Union's organizational campaign continued he would shut the plant. No evidence was introduced to support this allegation. Accordingly, the undersigned will recommend that the complaint in this respect be dismissed.

B. *The alleged discriminatory discharges*

The complaint alleged that, in violation of the Act, the respondent discharged Joseph Spisak and Joseph Jost on April 9, 1946, and on the same day laid off Edmund Jastal, and on May 15, 1946, laid off James Takacs. In its answer the respondent averred, and at the hearing contended, that Jost and Spisak were discharged not in violation of the Act but for cause, and that Jastal and Takacs were laid off due to lack of work. The facts pertaining to the above-named individuals will be discussed *seriatim*:

Joseph Jost was first employed by the respondent in January 1941, as a tool maker; later he became a jig bore operator. No fault was ever found with his work nor with his ability to perform the various tasks assigned to him and the respondent does not claim that he was discharged for any reason except that commencing about a month or so before April 9, 1946, Jost became such a quarrelsome and contentious employee that it was obliged to sever his employment.

Jost, although requested several times while in the respondent's employ to join the Union, refused to do so. There is some evidence that he joined the Union after his discharge, but the record is silent as to when this affiliation took place. Board's counsel contended at the hearing, that when Jost said to Cecil early in the day of Jost's discharge, "I heard, Roy, you joined the Educational Association, too," Cecil had every reason to believe that Jost was a member, or at least in sympathy with the organizational campaign, of the Union. Board's counsel laid great stress in his argument against the motion to dismiss the complaint as to Jost, on the implication that Cecil placed upon the word "too" in the above-quoted statement of Jost. Viewed in its context, Board's counsel argued, the word "too" conveyed to Cecil that Jost was for the Union and hence an employee with whom the respondent must deal. This, he continues, was demonstrated by the discharge of Jost several hours after he had made the statement. No such inference can be drawn from the credible evidence adduced at the hearing. Cecil testified, and the undersigned finds, that Jost asked him whether he had joined the Educational Association; that he assumed Jost meant that he joined the Union; that he replied that he had not; and that he then explained to Jost that, as far as he personally was concerned, the Union would reduce his "take home pay." Cecil did not add the word "too" in quoting Jost. No inference can properly be drawn, such as suggested by Board's counsel. His argument may have some weight under certain other conditions, but upon the record herein, his argument is without merit.

Assuming, *arguendo*, that the respondent had actual knowledge that Jost was a member of the Union, still a finding could not properly be made that his discharge was brought about by such membership for the credible evidence would not support such a finding. The record reveals, as the respondent contended,

that Jost was discharged because he spent too much time going from and to the tool crib to secure tools and with provoking arguments with Carl Auletta, the tool crib attendant.

It seems that for a period commencing at least a month before his discharge, Jost would habitually complain to Auletta about the sharpness of certain tools he had requested of Auletta; that Jost, on occasions, would stand at the tool crib window and examine the proffered tools with a magnifying glass; that Jost rejected most of the tools on the ground that they were not sharpened enough; that on several occasions, Jost rejected new unused tools on the same ground; that several days prior to Jost's discharge, after Auletta had repeatedly complained to Ellis and Libuda about Jost's conduct, Libuda happened to be in the tool crib when Jost refused to accept the tools given to him by Auletta and threw them on the floor of the tool crib; that thereupon Libuda picked up the tools, asked Jost what fault he found with them, and after Jost stated that they were not sharpened enough, pointed out to Jost that all were very sharp, and that some were new, unused tools; that Jost made many unnecessary trips to the tool crib, thereby neglecting his work; that his uncalled-for arguments with Auletta delayed other employees in receiving tools; that on one occasion Jost kicked Auletta during an argument about a tool; and that on the day of his discharge, Jost made a great many unnecessary trips to the tool crib and engaged in a great many arguments with Auletta.

The undersigned is convinced, and finds, that Jost's arguments, which he himself provoked, the unreasonable attitude he assumed with respect to the rejection of the tools, and the manner with which he rejected the tools were the motivating reasons for his discharge and not the reason alleged in the complaint. This finding is buttressed by the demeanor of Jost while on the witness stand. Jost impressed the undersigned as being a dominating, contentious, quarrelsome, belligerent individual.

The undersigned finds that by discharging Joseph Jost on April 9, 1946, the respondent did not violate the Act. Accordingly, the undersigned will recommend that the allegations of the complaint with respect to Joseph Jost be dismissed.

Edmund Jastal was first employed by the respondent in June or July 1945, and worked as a bore mill operator until April 9, 1946. Jastal joined the Union during the first week in April 1946, but never attended any union meetings nor did he take any part in the Union's campaign. In short, the extent of Jastal's activity in behalf of the Union was the signing of a membership application card.

The respondent contended that due to lack of work, it decided to lay off Jastal and have Cecil finish the job Jastal was then doing because Cecil had no work to do. It also contended that it had no knowledge of Jastal's union affiliation at the time of his lay-off and even if it did know that he was a member of the Union, that fact would not have played any part in its determination. The record discloses no evidence that on or before April 9, 1946, the respondent knew that Jastal was a member of the Union. Admittedly he took no part in any of the Union's activities. Board's counsel contended that the respondent derived knowledge of Jastal's Union membership from the conversation Jastal had with Ellis on the day of Jastal's discharge or the day previous thereto is without merit. The only mention of the word "union" in that conversation is Jastal's reference to Libuda's being "mad" and Libuda's being "madder" after "the Union gets in." ⁸

⁸ The entire conversation is set forth above.

Not only did the Board fail to adduce evidence upon which a finding could be based that the respondent had knowledge of Jastal's union membership, but the record is devoid of any anti-union motivation on the respondent's part with respect to Jastal. The record, moreover, is also devoid of any evidence upon which a finding could be based that the respondent *suspected* that Jastal was *sympathetic to unions in general*. Under the circumstances, the undersigned finds that the respondent was not motivated by antipathy for this or any other union, when it decided to lay off Jastal. The undersigned further finds that Jastal's lay-off was necessitated by business considerations. Accordingly, the undersigned will recommend that the allegations of the complaint with respect to Edmund Jastal be dismissed.

Joseph Spisak commenced his employment with the respondent in September 1944, and worked continuously thereafter as a lathe operator until his discharge on April 9, 1946. Spisak joined the Union in March 1946. The only meeting of the Union he attended, while in the respondent's employ, was the one held on March 15. Like other employees he discussed the Union in the plant. He did not, however, ask any of his co-workers to join the Union nor did he take any part in the Union's organizational campaign.

At about quitting time on April 9, Ellis informed Spisak that he should return his tools to the tool crib because he was being discharged. When Spisak asked the cause of his discharge, Ellis replied, to quote Spisak's testimony, "for reading the paper all the time." Ellis testified, and the undersigned finds, that he discharged Spisak because about 10 days prior to April 9, Spisak, instead of watching his machine, was reading a newspaper and two 150-pound pieces had to be "scrapped"; that on that occasion he told Spisak that he must not read while material was in his machine but if he did read, "he should at least watch his machine"; that on the day of Spisak's discharge, because Spisak was reading and not watching the machine, Spisak threaded 36 pieces of material incorrectly, that when he reprimanded Spisak for his carelessness, Spisak replied, "What difference does it make which way they run";⁹ and that Spisak "kept sitting and he kept reading" the balance of the day. Ellis further testified, and the undersigned finds, that Spisak, referring to the period immediately prior to April 9, "had got so, when he would sit down to read he would turn around to his bench"¹⁰ and put his elbows on the bench and his chin in his hands and read magazines" and newspapers. Ellis also testified, and the undersigned finds, that he did not know on or before April 9, the date of Spisak's discharge, that Spisak was a member of the Union.

Spisak testified that no one ever criticized his work while he was in the respondent's employ; that the only "scrap" he had, was before V-J day and Libuda "suggested a way to fix it" so that the piece could be saved from the scrap pile; that he had no "scrap" the day he was discharged; that throughout his entire employment, he and all the other employees read newspapers during working hours and at no time was anyone told by the management not to read during working hours; that on one occasion Libuda and he were discussing a trade magazine article and Libuda suggested that he read the trade magazines the respondent had in its reception room; that Libuda, Cecil, and Ellis read newspapers in the plant during working hours; and that a day or two before he was discharged he and Cecil discussed the Union.¹¹

⁹ The job on which Spisak was then working called for 72 shafts; 36 to contain right hand threads and 36 left hand threads.

¹⁰ Meaning, with his back to his machine.

¹¹ This conversation is set forth above

At the hearing, the respondent maintained that it did not discharge Spisak in violation of the Act because it did not know, at the time of his discharge or prior thereto, that he was a member or active in behalf of the Union. Board's counsel contended that Spisak's Union affiliation was brought to the respondent's attention during the conversation between Spisak and Cecil referred to immediately above. Irrespective of whether or not the respondent knew of Spisak's union affiliation while he was in its employ, the undersigned is convinced, and finds, that Spisak's Union affiliation played no part in the respondent's determination to discharge Spisak. The undersigned further finds that about 12 days prior to his discharge Spisak was warned by Ellis to pay closer attention to his work; that Spisak persisted in reading newspapers and magazines and to permit such reading to interfere with his work;¹² that because he permitted his reading to divert his attention from his work, he performed imperfect work on the aforesaid two 150-pound pieces and on the 36 shafts. Accordingly, the undersigned will recommend that the allegations of the complaint with respect to Joseph Spisak be dismissed.

James Takacs commenced his employment with the respondent on April 19, 1944. Until his lay-off on May 15, 1946, Takacs was a grinder. He joined the Union in March 1946, and immediately became very active in its behalf. He attended all meetings of the Union and was chosen as the Union's observer for the Board's conducted election which was held on April 24, 1946.

The respondent does not question Takacs' ability to do the work assigned to him, but contended that lack of work necessitated Takacs' lay-off on May 15. The credible testimony of Libuda, Ellis, Cecil, and Mary Malko, the respondent's general office clerk, coupled with certain documents introduced in evidence by the respondent, clearly indicates that the respondent's business was steadily decreasing after V-J Day and that by May 15, the situation had reached a point where Takacs' services were no longer needed. In short, Takacs' lay-off was a normal one. There is no substantial evidence that anyone in management evidenced any interest in Takacs' membership and activities in behalf of the Union. Nor is there any substantial evidence that the respondent had any antipathy for this or any other union.

It is well settled that the Act does not interfere with the normal right of an employer to discharge or lay off an employee for good reason;¹³ or at will if such discharge or lay-off be not a violation of the statutory prohibition. In the instant case, the respondent claims good reasons for the laying off of Takacs; to wit, lack of work. It would serve no useful purpose to set forth here at length the evidence, already summarized above, to which Board's counsel points as supporting his contention that the respondent, in discharging Jost and Spisak and in laying off Jastal and Takacs, was motivated by anti-union antipathy. The summary shows its substance. The undersigned finds that the composite background and the individual incidents in connection with each of the lay-offs and discharges does not furnish sufficient evidence for the conclusion that the respondent discriminatorily laid off Takacs on May 15, 1946. The union activities of Takacs are not sufficient in themselves to support an inference that they were the cause of his lay-off.¹⁴ Accordingly, the undersigned will recommend that the allegations of the complaint with respect to James Takacs be dismissed.

¹² It is significant to note that Jastal read newspapers in the plant, but, as he testified, he "covered it up" so that the bosses would not see him reading.

¹³ *N. L. R. B. v. Fansteel*, 306 U. S. 240; *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1.

¹⁴ *N. L. R. B. v. Montgomery Ward & Co.*, 157 F. (2d) 486 (C. C. A. 8); *N. L. R. B. v. Citizen-News Co.*, 134 F. (2d) 970 (C. C. A. 9).

Board's counsel contended at the hearing that Jastal and Takacs were discriminatorily refused reinstatement because after their lay-offs the respondent advertised in a daily Cleveland, Ohio, newspaper for persons to fill jobs for which Takacs and Jastal testified they could fill, but that neither one of them was recalled. With the disclosure of the union affiliation of Jastal and Takacs, the former shortly after April 9, and the latter shortly prior to April 24, there might be some threat to tie the failure to recall them, or either of them, to their union affiliations, but it is too tenuous to be classed as substantial evidence. There is no evidence of custom of recalling employees, in or out of order. There clearly were no rules of seniority. Under such circumstances, the respondent was under no obligation to recall either Jastal or Takacs.¹⁵ In the absence of a clear showing that failure to recall Jastal or Takacs was directly due to their union affiliations, no unfair labor practice for such failure may be inferred.

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

CONCLUSIONS OF LAW

1. The operations of the respondent, The Efficient Tool & Die Company, Cleveland, Ohio, occur in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The respondent has not engaged in unfair labor practices as alleged in the complaint, within the meaning of Section 8 (1) and (3) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the complaint be dismissed in its entirety.

As provided in Section 203.39 of the Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946, any party or counsel for the Board may, within fifteen (15) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.38 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof; and any party or counsel for the Board may, within the same period, file an original and four copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, 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. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.65. As further provided in said Section 203.39, 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 service of the order transferring the case to the Board.

HOWARD MYERS,
Trial Examiner.

Dated August 18, 1947.

¹⁵ *Matter of Burson Knitting Company*, 35 N. L. R. B. 772.