

In the Matter of DON JUAN CO., INC., AND DON JUAN, INC., and UNITED
PACKINGHOUSE WORKERS OF AMERICA CIO, DISTRICT 6

Case No. 2-C-6533

SUPPLEMENTAL FINDINGS
CONCLUSIONS AND RECOMMENDATION

May 18, 1950

On August 27, 1948, the National Labor Relations Board issued a Decision and Order in this case,¹ in which it found that Don Juan Co., Inc., and Don Juan, Inc., herein called the Respondents, had engaged in and were engaging in certain unfair labor practices affecting commerce, and ordered the Respondents to cease and desist therefrom and to take certain affirmative remedial action. The Board found, among other things, that the Respondents had unlawfully discharged employees Wilkinson and Holmes on the ground that they had ceased to be members in good standing of Hair Goods, Toiletries and Accessories Workers Union, No. 21906, AFL, herein called the Union, which was the contractual bargaining representative of the Respondents' employees. To remedy this unfair labor practice, the Board directed the Respondents to offer reinstatement to Wilkinson, the only one of the two discharged employees who desired reinstatement, and to make whole both Wilkinson and Holmes for any loss of pay they may have suffered as a result of the discrimination.

The Board thereafter petitioned the United States Court of Appeals for the Second Circuit for enforcement of its Order against the Respondents. On December 9, 1949, the Court handed down its opinion. In connection with the Board's back-pay order, the Court, referring in its opinion to three early cases² in which the Board had declined to order back pay because the legal rights of the parties were doubtful

¹ 79 NLRB 154.

² *M & M Woodworking Company*, 6 NLRB 372; *Smith Wood Products, Inc.*, 7 NLRB 950; *McKesson & Robbins, Inc.*, 19 NLRB 778. See p. 4, *infra*.

89 NLRB No. 191.

and because the employer had acted in good faith, stated that in the instant case—

It does not appear from the record that the Board considered the question of good faith at all, or whether, if the discharges were thought to have been in good faith, it intended to depart from what seems to have been its practice in refusing to order back pay in such a situation. We think that there should be findings in respect to the question of good faith and a clear indication of the policy which the Board determines to exercise in the particular circumstances.

On March 29, 1950, the Court handed down its decree, directing that all provisions of the Board's Order be enforced except insofar as they related to the award of the back pay, and remanding the proceeding to the Board for further consideration of the back-pay question in the light of the Court's opinion.

Pursuant to the remand by the United States Court of Appeals for the Second Circuit, and upon consideration of the entire record in the proceeding, the Board³ makes the following:

Supplemental Findings and Conclusions

The record reveals that the collective bargaining contract between the Respondents and the Union immediately preceding the one in force at the time of the discharges had contained a clause which, although not entirely clear, might be construed as requiring membership in the Union as a condition of employment. This clause was omitted, however, from the agreement in effect at the time of the discharges, and the pertinent clauses of the later agreement provided only a prohibition against the Respondents entering into individual contracts with any employee-member of the Union, and a dues checkoff for such employee-members. The Respondents contended that the contract with the Union required the discharge of Wilkinson and Holmes upon their loss of good standing. We stated in our earlier decision, 79 NLRB 154, 156, that "the contract on that score is ambiguous." Accordingly we held, and the Court agreed, that the discharges were illegal because union-security provisions, to fall within the proviso of Section 8 (3) of the Act prior to amendment, must be clear and unambiguous.

In response to the mandate of the Court "that there should be findings in respect to the question of good faith," we are prepared to

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

assume that the Respondents acted in good faith in their construction of the contract. At the direction of the Court, we set forth here "a clear indication of the policy" which guides us "in the particular circumstances."

We believe that the inherent equities of such a situation require that, whether the discharges were made in good faith or bad faith, the financial loss resulting therefrom should be borne by the Respondents, who committed the illegal acts, not by the two employees who were discharged through no fault of their own. The risk of mistake in construing ambiguous provisions of a supposed union-security contract should reside with the party who misinterprets the contract, rather than with the employees against whose interest the contract has erroneously been thought to run.

The requirement, under such circumstances, that the illegally discharged employees be reimbursed for their losses of back pay is consistent with our usual practice in such a situation, and with the practice of the courts. Although in the early cases cited by the Court, we declined, where schisms in the bargaining agent or jurisdictional disputes had occurred, to order back pay, in more recent cases analogous to the instant one, we have repeatedly ordered this remedy. In the *Portland Lumber Mills* case,⁴ for example, the Board stated:

. . . in the instant case, the respondent discharged Wilmarth because it believed *in good faith*, though mistakenly, that the terms of its closed-shop contract with the intervenor required that the respondent accede to the intervenor's demand for Wilmarth's dismissal. Under such circumstances . . . like the Trial Examiner, we shall order the respondent to take certain affirmative action, including reinstatement of Wilmarth *with back pay*, designed to effectuate the policies of the Act. (Emphasis supplied.)

In *Geraldine Novelty Company, Inc.*,⁵ the Trial Examiner found that, ". . . respondent discharged the employees in question because it believed, although mistakenly, that it was required to do so by the terms of its union shop agreement, and not to satisfy any illegal purpose of its own." The Trial Examiner specifically considered the question of the appropriate remedy, and recommended "under such circumstances" that the Respondent make whole the discharged employees by paying them back pay. We adopted the findings, conclusions, and recommendations of the Trial Examiner in that case,

⁴ 64 NLRB 159, 160. See also *Eureka Vacuum Cleaner Company*, 69 NLRB 878; and *Stanislaus Wood Products*, 79 NLRB 260.

⁵ 74 NLRB 1503.

ordered back pay for the discharged employees, and this Order was enforced in full by the United States Court of Appeals for the Second Circuit.⁶

The three cases cited in the Court's opinion⁷ were decided within the first 5 years of the operation of the statute, and, as the later cases cited above amply demonstrate, have not been construed as imposing a rigid rule that a good-faith misinterpretation of a contract will relieve from liability for back pay. In two of those cases, the Board was no doubt influenced in part by a desire to respect, insofar as possible under our decisions, a contrary interpretation of the contract rendered by a United States District Court (*M & M Woodworking Company, supra*, at pp. 381-382, 383, *Smith Wood Products Co., supra*, at p. 957). In the third case, the Board was probably influenced in part by a desire not to discourage the making of truce agreements, such as that which underlay that controversy (*McKesson & Robbins, supra*, at pp. 801, 802). Those cases should be viewed, therefore, as exceptions to our general rule that it "will effectuate the policies of this Act" to order reinstatement with back pay to employees who are illegally discharged for nonmembership in a union, regardless of the employer's good faith in erroneously believing that this contract with the union required their discharge. Respondents in this case show no special circumstance to warrant not applying this general rule.

Accordingly, we are convinced, and find, that whether the Respondents discharged Wilkinson and Holmes in good or bad faith, it will effectuate the policies of the Act to require the Respondents to make

⁶ 173 F. 2d 14. We have, with judicial approval, applied the same principle where the employer, although not motivated by antiunion animus, either under pressure or under a mistaken view of the legal effect of his conduct, acted in such a way as to interfere with rights protected under the Act. Thus, in *Hudson Motor Car Co.*, 34 NLRB 815, enforced 128 F. 2d 528 (C. A. 6) we ordered reinstatement with back pay of employees who with the employer's condonation were excluded from the plant by adherents of a majority union because of their preference for a rival union. The Court of Appeals, which enforced the order, overruled the objection that the back-pay order was improper because the respondent had not discharged the employees in question for any illegal purpose of its own, stating (p. 533): "We think it right and just to say that so far as the record shows, respondent has not wilfully violated the provisions of the Act, but the intent of the Employer is not within the ambit of our power to review. When it is once made to appear from the primary facts that the Employer has violated the express provision of the Act, we may not inquire into his motives." Also, employers have been required to reinstate and reimburse employees who were penalized for violating a nondiscriminatory rule against either solicitation or distribution of literature on employer premises during nonworking hours, where the rule, although honestly promulgated and applied, nevertheless invaded rights protected under the Act insofar as it extended to union activity. *Republic Aviation Co.*, 51 NLRB 1181, 1187, 1189, enforced 142 F. 2d 193 (C. A. 2), affirmed 324 U. S. 793; *LeTourneau Co. of Georgia*, 54 NLRB 1253, 1259, 1264-1265, enforced 324 U. S. 793 (reversing the Court of Appeals judgment setting the order aside, 143 F. 2d 67 (C. A. 5).

⁷ See footnote 2, above.

whole these employees for any losses of back pay they may have suffered by reason of their illegal discharges.

RECOMMENDATION

Upon the basis of the above supplemental findings and conclusions, and of the entire record in the case, the National Labor Relations Board hereby respectfully recommends to the United States Court of Appeals for the Second Circuit that the Board's Order of August 27, 1948, be enforced in its entirety.