

In the Matter of UNITED DISTILLERS OF AMERICA, LTD. and JAMES SMITH, AN INDIVIDUAL

Case No. 5-CA-180.—Decided August 31, 1950

DECISION AND ORDER

On May 5, 1950, Trial Examiner Bertram G. Eadie 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 actions, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed its exceptions to the Intermediate Report and a supporting brief.

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 [Members Reynolds, Murdock, and Styles].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner insofar as they are consistent with our Decision and Order herein.¹

1. The Trial Examiner found that the Respondent violated Section 8 (a) (1) and (3) of the Act by discharging Smith for union activities, and not for the alleged violation of a company no-solicitation rule as contended by Respondent.

The Respondent contends that the discharge was for union solicitation on company time and property in violation of a rule. The Respondent, however, adduced no evidence at the hearing in support of this contention. Furthermore, although Smith admitted knowledge

¹ The request of the Respondent for oral argument is denied because the record and brief submitted by the Respondent, in our opinion, adequately present the issues and the positions of the parties.

of the existence of a no-solicitation rule,² there is no credited evidence of a violation on the part of the dischargee.

Indeed at the meeting between Colby, Fiterman, Deaton, and Smith, the latter, according to credited testimony, was not accused of violating the rule, but simply of attempting to bring in another union. In addition, there were insinuations that the dischargee was involved in the theft of whiskey for which another employee had already been discharged. Shortly thereafter Smith was summarily discharged without explanation from the Company.

In view of all the foregoing, the only reasonable explanation of the discharge shown by the record is Smith's union activities. We therefore agree with the conclusions of the Trial Examiner that Smith was discharged in violation of Section 8 (a) (1) and (3) of the Act.

The Remedy

As recommended by the Trial Examiner, we shall order the Respondent to offer James Smith reinstatement with back pay from the date of his discharge. Since the issuance of the Trial Examiner's Intermediate Report, however, the Board had adopted a method of computing back pay different from that prescribed by the Trial Examiner.³ Consistent with the new policy, we shall order that the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to the date of a proper offer of reinstatement. The quarterly periods, hereinafter called "quarters," shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which these employees would normally have earned for each quarter or portion thereof, their net earnings,⁴ if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.

We shall also order the Respondent to make available to the Board upon request payroll and other records to facilitate the checking of the amount of back pay due.⁵

² We do not pass upon the Trial Examiner's rationale on the evidence necessary to support a finding of the existence of the rule.

³ *F. W. Woolworth Company*, 90 NLRB 289.

⁴ 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, which would not have been incurred but for this unlawful discrimination, and the consequent necessity of his seeking employment elsewhere. *Crossett Lumber Company*, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered earnings. *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7.

⁵ *F. W. Woolworth Company*, *supra*.

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 Respondent, United Distillers of America, Ltd., Baltimore, Maryland, its officers, agents, successors, or assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in any labor organization of its employees, by discriminatorily discharging, refusing to reinstate, or by discriminating in regard to their hire or tenure of employment, or any term or condition of employment;

(b) In any manner interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

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

(a) Offer to James Smith immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section entitled "The Remedy" for any loss of pay which he may have suffered as a result of the discrimination practiced against him;

(b) Upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the right of reinstatement under the terms of this Order;

(c) Post at its plant at Baltimore, Maryland, copies of the notice attached hereto marked Appendix.⁶ Copies of such notice, to be furnished by the Regional Director for the Fifth Region, shall, after being duly signed by a representative of the Respondent, 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 other material;

⁶ In the event that this Order is enforced by decree of a Circuit Court of Appeals, there shall be inserted before the words "Decision and Order" the words "Decree of the United States Court of Appeals Enforcing."

(d) Notify the Regional Director for the Fifth Region in writing, within ten (10) days from the receipt of this Order what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL OFFER to the employee named below immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination:

James Smith

All our employees are free to become or remain members of any labor organization, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment against any employee because of membership in or activity on behalf of any labor organization.

UNITED DISTILLERS OF AMERICA, LTD.,
Employer.

By _____
(Representative) (Title)

Dated _____

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

John J. Pickens, Esq. of Washington, D. C., for the General Counsel.

Alfred A. Colby, Esq., Labor Consultant and Attorney, of Washington, D. C., for the Respondent.

STATEMENT OF THE CASE

Upon a charge duly filed by James Smith, the General Counsel of the National Labor Relations board, herein called the General Counsel, and the National Labor Relations Board, herein called the Board, by the Regional Director for the Fifth Region (Baltimore, Maryland), issued a complaint against the United

Distillers of America, Ltd., herein called the Respondent. A copy of the charge and complaint were duly served on the Respondent. The complaint set forth that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, hereinafter called the Act.

With respect to the unfair labor practices, the complaint alleges jurisdictional facts, and, also that James Smith was discharged by Respondent, as an employee and refused him reinstatement, because of his real or suspected affiliation and sympathy with and activity on behalf of labor organizations; and in opposition to other labor organizations and because he engaged in other concerted activity for the purpose of collective bargaining or other mutual aid or protection. The complaint also alleged that the aforesaid conduct, of the Respondent, constitutes unfair labor practices within the meaning of Section 7 of the Act. The Respondent filed an answer in which it admitted the jurisdictional allegations in the complaint but denied the commission of unfair labor practices.

Pursuant to notice, a hearing was scheduled and held on March 24, 1950, at Baltimore, Maryland, before the undersigned, Bertram G. Eadie, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented at the hearing. All parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

At the hearing, the General Counsel moved to amend the complaint by striking out the words "real or" in the seventh paragraph thereof. The motion was granted without objection.

At the conclusion of the hearing, the General Counsel moved to conform the pleadings to the proof as to minor variances such as names, dates, and spelling. The motion was granted without objection.

The answer was amended on motion of the attorney for Respondent, without objection by the General Counsel, so as to set forth as a separate defense, the following:

The Company (Respondent) at this time explains that the reason for the discharge of the employee James Smith was the improper carrying on of union activities on Company time for a period of several months prior to the date of his discharge by arguing with, soliciting other employees in the plant of the Company at Baltimore, urging them to apply for membership in a union other than that with which they were affiliated, by interfering with their work while on Company time, knowing that there was a well understood Company rule prohibiting such activities.

At the conclusion of the hearing, Respondent moved to dismiss the complaint for lack of proof. Decision was reserved on the motion and is now denied. Briefs were submitted on behalf of the Respondent and the General Counsel.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a New York corporation operating a distillery plant located at Baltimore, Maryland. It has been engaged continuously at all times material

herein in the manufacture, sale, and distribution of alcoholic beverages at various plants throughout the United States. This proceeding is concerned only with the Baltimore plant. The Respondent at its Baltimore plant purchases raw materials amounting to approximately \$5,000,000 annually, of which at least 95 percent are received from points outside the State of Maryland, and sells products amounting to approximately \$10,000,000 annually, of which 95 percent are shipped to points outside the State of Maryland. The Respondent admits that it is engaged in commerce within the meaning of the Act, and the Trial Examiner so finds.

II. THE ORGANIZATIONS INVOLVED

International Union of Operating Engineers, A. F. of L., Local No. 272; Distillery, Rectifying and Wine Workers International Union of America, Local No. 22, A. F. of L.; and United Construction Workers, U. M. W. A., Local No. 729 are labor organizations which admit to membership employees of the Respondent. Hereinafter the above Unions will be referred to respectively, as the (a) Engineers; (b) Wine Workers; and (c) Construction Workers.

III. THE UNFAIR LABOR PRACTICES

A. *The discharge of James Smith*

The Respondent, at the times material herein, had collective bargaining contracts with the Engineers and the Wine Workers.

James Smith was employed by the Respondent in its plant at Baltimore, Maryland, as an engineer from the spring of 1943 until his discharge on March 6, 1949. When Smith first entered the employ of Respondent, he was an extra engineer replacing an engineer who was temporarily off at the time. After the absentee's return, he was steadily employed by Respondent as an engineer and at times worked in the maintenance department. He became a steady watch engineer when a vacancy occurred in the boiler room. At that time he was a licensed engineer second class. War time regulations permitted him to operate the plant of the Respondent under such a license. The plant generally throughout his employment was operated on a 24-hour basis. There were four engineers employed at the plant. Three of them operated the plant in running shifts of 8 hours each. The fourth had an engineer's license, but did not operate as a watch engineer; he was generally employed throughout the plant as a foreman. Thereafter Smith received his first-class engineer's license. After the close of World War II engineers holding licenses first-class were required to operate the plant by the laws of Maryland. The two other operating engineers were junior in point of seniority to Smith in their employment at the plant of the Respondent.

Smith was a member and shop steward of the Engineers. As such, his duties were to confer with fellow Engineers: Alfred A. Colby, labor consultant for the Respondent; William S. Deaton, business agent of the Engineers; and Fiterman, the superintendent of the plant. He served as shop steward for the four engineers, members of Local No. 272, employed by the Respondent. He was a member in good standing and shop steward of the Engineers Local 272 on March 6, 1949, when he was discharged by Respondent.

Smith complained on several occasions both to his fellow Engineers and Deaton, the business agent of the Engineers, that a new contract should be negotiated between the Respondent and the Engineers. By the terms of the contract

between the Engineers and Respondent its expiry date, October 10, 1948, was permitted to pass without a new contract being negotiated between the Respondent and the Engineers. The contract, however, provided that it was to continue in force from year to year, unless 60 days prior to October 10 of any year, written notice be given by either party for a change in its terms. While in Respondent's employ, Smith spoke to Deaton on several occasions about it and on one occasion phoned and asked "who was asleep at the switch" and "why wasn't this contract tended to." Deaton said, "keep your shirt on. We will hear from them maybe tomorrow." No results followed.

About January 1949, a group of stationary engineers who were not employees of the Respondent, approached the Construction Workers and asked that a union be formed for them. The request was not immediately granted. A hall of the Construction Workers was made available for meetings of this group. After one or two informal meetings, the group requested that a charter be granted them by the Construction Workers for the formation of a union to represent them. During the formative period of the organization, almost all of the meetings were open to anyone in the engineering profession. Joseph P. Conlon, a representative of the Construction Workers, was assigned by his Regional Director to act as chairman for these meetings. Deaton, the business agent of the Engineers, attended one of the meetings as a visitor. It was about the second or third of said meetings to be held.

The Construction Workers at that time were not making any determined effort to organize production and maintenance employees of the Respondent. It was mainly interested in the organization of engineers who were employees of the plants and institutions in the Baltimore area. Engineers were solicited by mail. Invitation was extended by post card, dated January 24, 1949, to a meeting to be held on January 26, 1949. A circular advising of the steps taken at the January 26 meeting was mailed to engineers throughout the area containing a notice of a meeting to be held on February 8, 1949.

Smith testified that while he was at home and off watch on the Thursday preceding his discharge, the following Sunday, Deaton called at his home and said "Come on Smitty, we are going out and negotiate a contract. The boss is out there." On arriving at the office of Respondent, they were met by Colby and Fiterman. Instead of discussion taking place in regard to negotiation of a new contract, Smith was accused by Colby that he was trying "to bring in another union," which Smith then denied. He told them "he wasn't interested in another union." Colby insinuated by his questioning of Smith that he was connected in some way with the theft of some cases of whiskey for which Boswell, another engineer, had been discharged from the plant previously. Smith denied he was at the plant at the time. Fiterman corroborated Smith and said "Yes, he was off." Smith testified that he was not told that he was discharged at the time of this meeting. Smith first learned of his discharge when Benny Funk, an employee of Respondent on duty at Respondent's plant, told him early Sunday morning, when Smith reported for duty at 12 p. m. Funk told Smith that he had orders from Fiterman "that the orders come down from New York for his discharge."

Concerning the conference between Colby, Fiterman, Deaton, and Smith, it is the uncontradicted testimony of Smith that he was extensively interrogated by Colby as to his connections with the Construction Workers; that Fiterman was told by Colby "to keep his mouth out of it"; that Deaton said that he saw Smith at the Construction Workers meeting; that Colby said "that he would

not be satisfied with any union other than the two unions with which he was dealing." Colby stated "that he had heard that Smith was soliciting for another union." Smith denied the charge and said "he was not interested in any other union."

Smith took more than a passing interest in the organization of the Construction Workers. Engineers throughout the Baltimore district had been circularized by the Construction Workers and a "Bunch of notices had been sent out." He spoke to both Solomon and Wills, two watch engineers, at the plant of Respondent where the three were employed. Solomon and Wills were called as Respondent's witnesses at the hearing. At the time of the hearing, they were still in the employ of Respondent. The two other engineers were not called as witnesses.

Concerning Smith's activities on behalf of the Construction Workers, Solomon, a witness called by Respondent, was questioned and testified as follows:

Q. What did he say

A. Well, he said, "Well, there is a new organization starting up. They're going to try to organize all the engineers, first grade engineers are going to get \$2.00 and \$2.25 an hour." I said I am in the American Federation of Labor 20 years and I wasn't interested.

* * * * *

Q. As nearly as you can possibly remember, how many times would you say that this was repeated as far as you were concerned?

A. Well, offhand, I would say four or five times

* * * * *

A. These conversations were had probably a couple of months before he [Smith] left, maybe two or three months, I wasn't interested in it. It could not have been in February. It could have been in November, December or January, anywhere up until February.

Wills, a witness for Respondent concerning the same subject, testified, in substance; that for a period of about 2 months "Smitty repeatedly asked him whether or not he wanted to join the Construction Workers"; that at one time he (Wills) said: "Well, whatever the rest of them do I will do"; that he went down to the meeting which was held on February 8, 1949; that he told Smith 2 days later that he had attended and that "that is all there was to it. I never heard any more out of Smith."

Two meetings of the Construction Workers were held before Smith's discharge, one on January 26 and the other on February 8, 1949. Smith only attended the first meeting and Wills the second.

Smith admits talking to both Solomon and Wills in the boiler room at Respondent's plant during the changes in shifts of watch engineers. He denies he ever asked Solomon or Wills to join the Construction Workers. He testified that he did ask them to go down to a meeting. Solomon corroborates Smith in that Smith never asked him to join the Construction Workers. Wills' testimony, however, is to the effect that Smith repeatedly asked him to join. Such testimony of Wills is discredited by the Trial Examiner as Smith was not a member of the Construction Workers; he was not one of the organizers; and apparently had lost interest as he did not attend any further meeting of that organization until after his discharge by Respondent. Smith impressed the Trial Examiner as an honest and sincere witness.

The Trial Examiner has reached the conclusion that Smith's union activities, complained about by Respondent, consisted solely of his several talks with his fellow watch engineers, either while he was relieving one of them, or when he

was being relieved, at the change of watches while on Respondent's time and property. He at no time asked, or solicited, his fellow engineers to join the Construction Workers. He did ask them to attend an organization meeting of that union. While employed by Respondent, throughout the years he carried on the usual duties of a shop steward for the engineers in the boiler room of the Respondent on company time. The Respondent had full knowledge of such union activities; but at no time made any complaint to him or any one else about such activities. It did however object and complain to him when his activities were directed toward the encouragement of his fellow engineers to attend a meeting of the Construction Workers, which had no business relationship with Respondent.

The Respondent contends, in substance, that it discharged him because he violated an alleged rule of Respondent prohibiting union activities on company time. The Trial Examiner is convinced and finds that Respondent discharged Smith because it suspected that he was a member of and was active on behalf of the Construction Workers and for no other reason.

There is no dispute that Smith, on company time, did ask fellow engineers to attend a meeting of Construction Workers.

C. Did Respondent have any such rule at its plant?

The record does not disclose that the Respondent at any time ever posted, published, declared, or otherwise notified its employees of any written or printed rule. As a defense the proof of the existence of such a rule is with the Respondent. Substantial evidence of its existence is required. Purporting to meet its required proof of any rule, Respondent seemingly relies solely on Smith's cross-examination, in which the following testimony appears:

Q. You were asked on direct examination if you were ever warned against union activity or talking and so forth on Company time. You know, don't you, that carrying on Union activities on Company time and organization work on Company time is against the rules?

A. I know that.

Q. You know that, don't you?

A. I know that yes, and I didn't do that.

The testimony of Smith does not furnish the required evidence. At most it is a conclusion or an opinion, neither being based on facts. The answer to such a question is one solely within the province of the Trial Examiner for determination. The Trial Examiner finds there are not or were not written rules of Respondent covering its plant. Employees were forbidden to smoke in other portions of the plant but were permitted the privilege in the boiler room. So far as union activities were concerned, the boiler room was the headquarters for the shop steward. He received complaints and suggestions from management, union, and employees on company time, relaying them to the proper officials.

The Trial Examiner is not oblivious of the fact that customs and policies have brought into business and industry unwritten rules and customs governing both employers and employees. Such rules and customs follow generally the conventions of society practiced in the neighborhood of the business establishments or plants. The Trial Examiner finds no substantial evidence in the entire record of this case that there was any unwritten rule or custom, prohibiting activities such as testified to by Smith and Respondents' witnesses.

Respondent failed to offer any substantial evidence and the Trial Examiner finds, that an unwritten rule or custom did not exist at the plant, which forbade the engineers in mentioning or discussing matters of mutual interest pertaining to their employment during the periods when the watches were changed at the scheduled hours; provided always that their actions were in nowise inimical to the proper operation and/or production of the plant.

The record in this case is replete to the effect and the Trial Examiner finds that Smith was discharged solely for the reason that he supposedly carried on union activities on company time and property in violation of some alleged rule.

During the course of Deaton's examination as a witness for Respondent on direct examination, the following is of record:

Colby. What I was trying to do, Mr. Examiner, was to defend the company against the insinuation that there was some other reason why he was discharged.

Q. Was there anything discussed at that meeting other than his union activities as a reason for discharge?

A. No.

Having found his activities did not violate any rule, written or otherwise, it is evident that he was discharged solely for alleged union activities.¹

The Trial Examiner is of the opinion that the injection of the charge that Smith violated alleged rule or rules at the Respondent's plant was strictly an afterthought. Wills and Solomon were the only operating engineers called by Respondent as witnesses. Their testimony was not impressive. Indeed, they both testified to the effect that they carried on similar conversations, concerning union activities, with each other when Smith was not present. The Respondent offered no explanation for the absence as witnesses of Fiterman, the superintendent, and Frank Wallent, the chief engineer and master mechanic, although it would seem that Fiterman and Wallent were both in positions to definitely set forth any complaints against Smith in violation of the term of his employment by Respondent. Again, only Deaton was called by Respondent as a witness as to what transpired at the conference at which Smith, Colby, Fiterman, and Deaton took part.

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 the operations of the Respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

¹ Section 7 of the Act. See *Victor Mfg. & Gasket Co. v. N. L. R. B.*, 174 F. 2d 867 (C. A. 7). "Of course, the Act does not interfere with the normal right of an employer to select his employees or to discharge them. He may discharge them for violation of his orders or rules, or for any reason, just or unjust, except that he may not discharge them because of Union activities, and where it is claimed that the employer was justified in discharging an employee, the controlling and ultimate fact which determines the issue is, what was the true reason back of his discharge. *N. L. R. B. v. Kohlen-Ligon-Folz*, 5 Cir., 128 Fed. 2d 502. But in deciding that issue, the Board is not bound to accept the employer's explanation of the discharge."

V. THE REMEDY

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

The Trial Examiner has found that the Respondent discriminated in regard to the hire and tenure of employment of James Smith, by discharging him on March 6, 1949. The Trial Examiner will therefore recommend that the Respondent offer James Smith immediate and full reinstatement to his former or substantially equivalent employment, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay which he may have suffered by reason of the Respondent's discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned as wages from the date of his discharge to the date of Respondent's offer of reinstatement, less his net earnings during said period.

CONCLUSIONS OF LAW

1. International Union of Operating Engineers, A. F. of L., Local No. 272; Distillery, Rectifying and Wine Workers International Union of America, Local No. 22, A. F. of L.; and United Construction Workers, U. M. W. A., Local 729 are labor organizations within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of James Smith, thereby discouraging membership in labor organizations, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of 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 (a) (1) of the Act.

[Recommended Order omitted from publication in this volume.]