

In the Matter of CHAUTAUQUA HARDWARE CORPORATION and UNITED
STEELWORKERS OF AMERICA, CIO

Case No. 3-CA-271.—Decided January 24, 1951

DECISION AND ORDER

On November 10, 1950, Trial Examiner George Bokar issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act, as amended, 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 supporting brief.

The Board¹ has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's brief and exceptions, and the entire record in the case,² and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and qualifications:

The Trial Examiner found that, although De Meyer was responsible for the quality and quantity of the work performed by the other employees in the tumbling and coloring room, he was not a supervisor within the meaning of the Act. We do not agree. The fact that De Meyer had responsibility for the work performed by such other employees is persuasive evidence that he also had the power responsibly to direct their work. And, as it appears that this work was not purely routine in nature, we conclude that its direction required the use of independent judgment. Under these circumstances, and upon the entire record, we find that De Meyer was a supervisor within the meaning of Section 2 (11) of the Act.

¹ Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this proceeding to a three-member panel [Members Houston, Reynolds, and Styles].

² The Respondent's request for oral argument before the Board is hereby denied, because, in our opinion, the record and the brief adequately present the issues and the positions of the parties.

Having found De Meyer to be a supervisor, we do not adopt the Trial Examiner's determination that President Jones violated Section 8 (a) (1) by his statement to De Meyer on March 1, 1950,³ after discussing union activity in the plant, that he could close the plant. Section 8 (a) (1) of the Act protects "employees" alone against interference, restraint, and coercion. As a supervisor, De Meyer was not an "employee" within the meaning of the Act, and therefore any threats of reprisal for union activity which the Respondent communicated to him alone would not have violated Section 8 (a) (1).

However, there is undisputed evidence in the record⁴ that De Meyer repeated the substance of Jones' statement to employee Chiazzese. We find, on the basis of this evidence, that Jones threatened De Meyer with the closing down of the plant because of the union activity of the employees and that this threat was conveyed to one of the employees, Chiazzese, by De Meyer. Upon these facts, we find, while Jones' statement to De Meyer did not in itself involve a violation of Section 8 (a) (1) of the Act by the Respondent, that section was violated by the Respondent when De Meyer repeated the substance of Jones' statement to Chiazzese.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (1) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Chautauqua Hardware Corporation of Jamestown, New York, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Steelworkers of America, CIO, by discriminatorily discharging any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of employment;

(b) By means of interrogation or threats of economic reprisal or in any other manner, interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid

³ The Trial Examiner at one point in his Report inadvertently referred to this conversation as having occurred on "October 1."

⁴ This evidence consists in testimony by Chiazzese that De Meyer told him Jones had said he couldn't support a union and would liquidate the plant if he had to. In view of the fact that our finding is based on the *repetition* of the threat by Supervisor De Meyer, it is immaterial that the Trial Examiner regarded this testimony as hearsay if used to establish the fact that Jones had made the threat.

or protection, or to refrain from any or all of 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.

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

(a) Offer Mario Martino and Joseph Chiazzese immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or any other rights and privileges;

(b) Make whole said Mario Martino and Joseph Chiazzese in the manner set forth in the section of the Intermediate Report entitled "The remedy" for any loss of pay they may have suffered by reason of the Respondent's discrimination against them;

(c) 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 and the right of reinstatement under the terms of this Order;

(d) Post at its plant at Jamestown, New York, copies of the notice attached to the Intermediate Report as Appendix A thereof.⁵ Copies of said notice, to be furnished by the Regional Director of the Third Region, shall, after being duly signed by the Respondent or his 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; and

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

INTERMEDIATE REPORT

Mr. Ralph E. Kennedy, for the General Counsel.

Edson & Edson, by *Mr. Samuel E. Edson*, Jamestown, N. Y., for the Respondent.

Mr. Joseph M. Manzella, Dunkirk, N. Y., for the Union.

STATEMENT OF THE CASE

Upon charges duly filed by United Steelworkers of America, CIO, herein called the Union, the General Counsel of the National Labor Relations Board, called herein respectively the General Counsel and the Board, by the Regional Director

⁵ That notice shall, however, be amended by substituting for the words "The recommendations of a Trial Examiner" in the caption thereof, the words, "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

of the Third Region (Buffalo, New York), issued a complaint dated June 5, 1950, against Chautauqua Hardware Corporation, 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 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the complaint and charges, together with notice of hearing thereon, were duly served on all the parties.

With respect to the unfair labor practices, the complaint alleged in substance that the Respondent violated Section 8 (a) (3) of the Act by discharging Mario Martino and Joseph Chiazzese, and Section 8 (a) (1) by various threats and by interrogations concerning the union affiliation of its employees.

The Respondent thereafter filed an answer denying the commission of the alleged unfair labor practices.

Pursuant to notice, a hearing was held on July 5 and 6, 1950, at Jamestown, New York, before George Bokar, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. All the parties except the Union 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 on the issues was afforded all parties. At the conclusion of the General Counsel's case-in-chief the Respondent moved to dismiss the complaint. The motion was denied. Decision was reserved on a renewal of the same motion at the end of the entire case. It is hereby denied. The parties waived their right to present oral argument but did file briefs with the undersigned. Submitted with the Respondent's brief were proposed findings of fact and conclusions of law.

Upon the entire record in the case and from observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, a New York corporation, is engaged in the manufacture, sale, and distribution of metal furniture trim and related products at its plant and principal office in Jamestown, New York. During the year 1949 the Respondent purchased raw materials valued in excess of \$450,000, of which approximately 50 percent was received from points outside the State of New York. During the same period the Respondent's annual sales exceeded \$850,000, of which approximately 95 percent was sold and shipped to points outside the State of New York.

The Respondent admits, and I find, that it is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Steelworkers of America, CIO, is a labor organization within the meaning of the Act admitting to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

A. Summary of events

The principal issue herein arises out of the discharge on March 2, 1950, of Mario Martino and Joseph Chiazzese, allegedly because of their union affiliation and activities.

The Respondent was formed late in 1945 and shipped its first order on March 30, 1946. During most of 1949 it operated at a loss and the problem of how to

increase production and get on the profit side of the ledger became one of increasing concern to the officials of the Company. The Respondent succeeded in showing a profit in December which increased somewhat during January and February. During this period the Respondent employed about 225 individuals.

It was during the latter part of February 1950 that some of the Respondent's employees first became interested in joining a union. Chiazzese arranged to have an official of the Union meet with seven or eight of the employees on the night of February 28. Both Chiazzese and Martino joined the Union that evening together with the others that attended, and all of them obtained blank application cards to distribute among their fellow employees.

The following day, on the plant premises during the lunch hour, Martino and Chiazzese as well as the others that had attended the union meeting the preceding night, openly solicited their fellow employees to join the Union. Chiazzese succeeded in obtaining 14 signatures.

Martino and Chiazzese worked in the coloring and tumbling room along with Jerry Carlson and Albert De Meyer. All four had joined the Union on February 28. De Meyer acted as a sort of straw-boss in relaying orders from Salvatore Nania, whose duties as foreman of the finishing department included supervision over De Meyer's section. De Meyer was held responsible for the quality and quantity of the work performed in the tumbling and coloring room. However, on the basis of the entire record, I am satisfied and find that De Meyer, at all times material herein, was not a supervisor within the meaning of the Act.

Just before the close of the workday on March 1, 1950, Foreman Nania instructed De Meyer to go to the office of Allan Jones, president of the Respondent. Jones disputes De Meyer's version of what occurred there. I am persuaded by a careful analysis of the entire record and the demeanor of these witnesses that De Meyer is the much more reliable and trustworthy witness and I credit his testimony. Jones was a vague and rambling witness given to speaking in generalities, and an analysis of his testimony reveals discrepancies and contradictions. In general therefore, I have not credited Jones where his testimony is irreconcilable with that of other witnesses. Of the remaining principal witnesses I found both Martino and Chiazzese to be trustworthy. Nania, although essentially honest, appeared reluctant to give any testimony that might seem damaging to the Respondent but when sufficiently prodded, testified on the whole, truthfully. In view of this discussion, it would serve no useful purpose to detail the conflicting testimony, and the findings hereinafter made are my own construction of the essential facts based on my evaluation of the witnesses.

To return now to De Meyer's meeting with Jones. The latter asked De Meyer what was "wrong with the boys . . . in the coloring room"; said that he knew and "had the proof that they were passing out union literature."¹ Jones then remarked that he "could close the plant down."² During the course of the conversation De Meyer volunteered that he was a member of the Union.³

¹ Jones testified that a day or two following the discharge of Martino and Chiazzese several of the older employees told him they resented being solicited by Martino and Chiazzese to join the Union. I believe and find that Jones had this information at the time of his conversation with De Meyer on October 1.

² Jones testified that he told De Meyer "the plant was not running on a profitable basis and unless we did get this plant on a profitable basis it would be necessary to close the plant down, . . ." Since the plant had been running on a profitable basis for the 3 months preceding this statement it points up *one* of the reasons compelling me not to find Jones a creditable witness. I do not credit his version.

³ Jones admitted that De Meyer told him that he was a union member but after first testifying that this occurred on March 2 (the day that Martino and Chiazzese were discharged) Jones later placed it as occurring on March 3.

About noon on March 2, Foreman Nania told both Martino and Chiazzese that President Jones wanted to see them in his office. There, Jones summarily discharged them saying, to quote Martino's undenied testimony, "I understand you men are dissatisfied, you are constantly bitching, . . . Here is your pay. Get out."

When the two men returned to their department and Chiazzese informed Nania of their discharge, saying, "I'll be back," Nania replied, "No, you won't. You can go . . . to the N. L. R. B. Board and it won't do you any good." Nania does not "remember" making any reference to the Board. Chiazzese's memory of the reference is credited.

Sometime just before or after the discharge of the two employees, Nania questioned three employees as to whether they had signed union cards. On about March 2, 1950, Foreman John Carlson asked Violet Eckner if she "had heard about the Union."

B. The Respondent's defenses

The Respondent contends that it discharged Martino and Chiazzese because of their misconduct and inefficiency, furthermore, that it had no knowledge of their union membership or activity at the time of their discharge. In view of the findings made above, I find the latter defense clearly to be without merit.

As to misconduct, the Respondent contends that this manifested itself in the "two employees fighting between themselves, fighting with other employees and annoying other employees." The record reveals no evidence of Martino and Chiazzese fighting between themselves, although at times they did argue, primarily about baseball. But there is no evidence that it interfered with their work or that of other employees. Foreman Nania never considered it serious enough to warrant discipline except that on a "couple of occasions" he "just told them to cut it out." And that "is all there was to it" testified Nania. There is testimony by former Superintendent Lewis Lane that from "time to time" during the period from the summer of 1949 until about March 1950, both Martino and Chiazzese lost "considerable extra time visiting other people," but this is not borne out by other witnesses I have found to be credible and I cannot therefore credit Lane's testimony. Or as Nania succinctly put it, "they were usually right down where they were working." I find the Respondent's contention summarized in the word "misconduct" to be without merit and as not being one of the causes for the discharge of Martino and Chiazzese.

We now come to the defense of inefficiency, arising out of the alleged wastage of materials by Martino and Chiazzese and in their allegedly causing damaged castings by improper loading of the tumblers. In order to evaluate the following findings in their proper perspective it is necessary to comment first on Nania's very close relationship with Jones. Nania started to work for Jones as a young boy at a time when Jones was "running" a plant in Boston. When, after the last war, Jones returned to his home town, Jamestown, and "started this plant" he sent for Nania. As foreman, Nania has the right to hire and fire and could do so without consulting Jones. Nania did not discharge Martino or Chiazzese or recommend that they be discharged, nor was he consulted by Jones prior to their discharge. In fact, no employee from Nania's department had ever previously been fired by Jones without Jones first consulting with Nania. "Mr. Jones probably knew something that I didn't know," testified Nania.

Both Martino and Chiazzese denied that they had ever wasted materials or that anyone had spoken to them about it. De Meyer believed both of them to be competent workmen and had never seen them waste materials. He did

admit that on several occasions Nania had mentioned that too much material was being used. Nania had received complaints from Jones about the excessive use of materials in the coloring and tumbling room and passed them on to De Meyer. The latter told Nania there was no wastage. Since Nania held De Meyer responsible for the running of the coloring and tumbling room and could only be there occasionally, Nania was not in a position to say whether Martino and Chiazzese wasted materials or not. "I still state there is no way of proving that they were wasteful or I could prove it," Nania testified.

De Meyer was held in high repute by both Jones and Nania as a very capable employee. In fact, when De Meyer quit in the spring of 1949 it was Jones who induced De Meyer to return about the middle of August. During De Meyer's absence Martino became straw-boss in the coloring room. Jones was not satisfied with the way Martino took over and blames him for loss of production, poor coloring of the hardware and damaged castings, all happening while Martino was in charge. Most of Jones' testimony, which I have characterized as vague and rambling, appears to be directed towards Martino and centers on his "incompetence" during the summer of 1949 while Martino was in charge of the coloring room. Despite Jones' complaints to Nania the situation did not improve. "That is the reason that I went over Nania's head and got De Meyer in there because De Meyer was more experienced and more intelligent and so forth and carried out my orders," testified Jones.

Asked why he did not discharge Martino when De Meyer returned to the plant replacing Martino as straw-boss, if Martino was so incompetent, Jones testified, "I demoted him and put him back to the other [job]—its never been my policy to fire anybody. . . . I have been willing there to change men around where they didn't fit in one job, try them some place else, . . . to see just where they might fit because I don't believe in labor turnover." Both Martino and Chiazzese received wage increases on October 31, 1949, and is explained by Jones as being caused by an increase in their "volume of work."

In September 1949, Jones was removed as president because the firm was losing money but was put back again on October 15. The following February, Jones removed Lane as superintendent and took over his duties. It is the contention of the Respondent that since Jones "had been for a long time dissatisfied with the work in the coloring and tumbling department in general and with Martino and Chiazzese in particular" that the discharge of these two employees was part of a general shake-up in the plant. Jones testified that "several times" he instructed Nania to discharge Martino and Chiazzese but Nania refused, and Jones testified, "I let it go at that and said I want to see results. . . . It wasn't until the results were not forthcoming that I took matters into my own hands at that time."

However it is difficult to determine from Jones' rambling and generalized testimony specifically just what Martino and Chiazzese failed to do after securing their wage increases on October 31, that caused their discharge. Jones seems to point partly to the alleged wastage of an expensive compound used in a new tumbling process instituted in the fall of 1949, a process, according to Jones, that "would cure the bending" of the castings; a tacit admission by him that the men in the tumbling room were not entirely at fault when damaged castings came out of the tumblers. He refers also to lack of production and to the "griping" of Martino and Chiazzese about their rate of pay. Accordingly, says Jones, "I told Nania that I couldn't stand for any conditions such as has been existing in there any longer, cost in that department and so forth, and to send these two men over to me and I let them go."

It is difficult to determine, assuming that materials were wasted, how Jones determined that the waste was caused by Martino and Chiazzese. There were two other men in the tumbling and coloring room, De Meyer and Carlson. All four from time to time worked on all operations. Or as Jones admitted, all four were responsible for the work coming from that department. In fact, De Meyer, in whom Jones had so much confidence, was really responsible, subject to Nania's general supervision, for the operation of the tumbling and coloring room. There is no proof in the record that Martino and Chiazzese wasted any more material, if any in fact was wasted, than did De Meyer or Carlson. The same reasoning applies to the alleged damaging of castings. I find this contention to be without merit.⁴ Nania testified that the lack of production complained of by Jones occurred "more or less" during the summer of 1949 while De Meyer was away and Martino was in charge. I find this contention to be without merit.

This brings us to the remaining contention about the griping of Martino and Chiazzese. Nania testified that Martino did complain about his rate of pay and working conditions, but when he received his last wage increase, apparently the one given on October 31, 1949, Martino ceased to complain about his rate of pay. But according to Jones, he received reports that both Martino and Chiazzese were still dissatisfied with their pay, and that since the four employees in the coloring and tumbling room were receiving a higher rate of pay than the plating department employees it caused considerable dissatisfaction among the latter group.

Concluding Findings

I am satisfied and find that Jones was concerned about the complaints of some of his employees about their rate of pay, that when this dissatisfaction reached the point where these employees decided to join the Union, Jones made up his mind to discharge the two employees he thought were primarily responsible for this activity, thus nipping in the bud the organizational efforts of the Union during its formative period. I am persuaded in view of the Respondent's knowledge of Martino and Chiazzese's union activities, the threat to De Meyer to close the plant, which I find was related to the organizational efforts, the timing of the discharges which occurred the day following the open solicitation for the Union in the plant, the unconvincing nature of the reasons for the discharges, that the real motivation therefor was the Respondent's desire to rid itself of the two individuals it considered to be the Union's chief protagonists, in violation of the rights guaranteed by Section 7 of the Act and Section 8 (a) (1) and (3).

I also find the instances of interrogation of union activities by Foremen Nania and Carlson and the threat to close the plant by President Jones to be independent violations of Section 8 (a) (1) of the Act.⁵

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.

⁴ I therefore find it unnecessary to determine whether in fact, as contended by the Respondent, there was much less use of material in the coloring and tumbling room following the discharge of Martino and Chiazzese.

⁵ See *Standard-Coosa-Thatcher Company*, 85 NLRB 1358.

V. THE REMEDY

Having found that the Respondent has engaged in the unfair labor practices set forth above, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Thus it will be recommended that Respondent remedy its discrimination against Mario Martino and Joseph Chiazzese, by offering to each of them immediate and full reinstatement to his former or substantially equivalent position⁶ without prejudice to his seniority or other rights and privileges. It will be recommended further that the Respondent make them whole for any loss of pay that they may have suffered by reason of the Respondent's discrimination against them. In accordance with the Board's policy,⁷ I shall recommend 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 discrimination on March 2, 1950, 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 each of the employees discriminated against would normally have earned for each quarter, or portion thereof, his net earnings,⁸ 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.

I shall also recommend that the Respondent make available to the Board, upon request, payroll and other records to facilitate the checking of the amount of back pay due.⁹

The violations of the Act which the Respondent committed are persuasively related to other unfair labor practices proscribed by the Act, and the danger of their commission in the future is to be anticipated from the Respondent's conduct in the past. The preventive purposes of the Act will be thwarted unless the order is coextensive with the threat. In order, therefore, to make more effective the interdependent guarantees of Section 7, to prevent a recurrence of unfair labor practices, and thereby minimize industrial strife which burdens and obstructs commerce, and thus effectuate the policies of the Act, it will be recommended that the Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the basis of the above findings of fact and upon the entire record of the case, I make the following:

⁶ In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible and if such position is no longer in existence then to a substantially equivalent position." See *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827.

⁷ *F. W. Woolworth Company*, 90 NLRB 289.

⁸ 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.

⁹ *F. W. Woolworth Company*, *supra*.

CONCLUSIONS OF LAW¹⁰

1. The United Steelworkers of America, CIO, 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 Mario Martino and Joseph Chiazzese, 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 such discrimination and 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 (a) (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.

[Recommended Order omitted from publication in this volume.]

¹⁰ The Respondent submitted separately numbered proposed findings of fact and conclusions of law. I accept the proposed findings of fact numbered 1, 2, 3, 4, 5, 7, 8, 9, 10, 18, 19, 20, 29, and 30. I reject 13, 15, 23, 24, 25, 26, 27, 28, 32, 33, and 34. I also reject 11, 12, 14, 16, 17, 21, 22, and 31, because, as worded, I cannot accept them entirely. I accept the proposed conclusions of law numbered 1 and 2. I reject 3, 4, 5, and 6.