

In the Matter of THE UNITED STATES CARTRIDGE COMPANY and
BROTHERHOOD OF RAILROAD TRAINMEN

Case No. 14-C-712.—Decided October 30, 1945

DECISION
AND
ORDER

On April 30, 1945, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, counsel for the Board filed exceptions to the Intermediate Report and a supporting brief. No request was made for oral argument before the Board at Washington, D. C., and none was held. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Board has considered the Intermediate Report, the exceptions and brief of counsel for the Board, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the addition noted below.

Having found that Clark was a supervisory employee and that the respondent would have been responsible for his union activity, the Trial Examiner concluded that Eifert's statement to Clark was not violative of the Act, on the ground that the statement was made by one supervisor to another. Counsel for the Board excepted to the Trial Examiner's finding of fact that Clark was a supervisory employee. We find no merit in this contention. However, notwithstanding Clark's supervisory status, it is conceivable that under the holding of the *Mississippi Valley Structural Steel Company* case,¹ the respondent would not necessarily have been responsible for his union activity. But this point is not raised by the exceptions, and we find it unnecessary to pass on it.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations

¹ 64 N. L. R. B. 78

64 N. L. R. B., No. 97.

Board hereby orders that the complaint against the respondent, The United States Cartridge Company, St. Louis, Missouri, be, and it hereby is, dismissed.

MR. GERARD D. REILLY took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT

Mr Harry G. Carlson, for the Board.

Messrs. C. P Berry, H. P Miller, and J C Randol, of St Louis, Mo, for the respondent.

STATEMENT OF THE CASE

Upon a charge filed on September 10, 1942, by Brotherhood of Railroad Trainmen, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Fourteenth Region (St. Louis, Missouri), issued its complaint dated March 19, 1945, against The United States Cartridge Company, 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.

With respect to unfair labor practices the complaint alleged that the respondent had interfered with the rights of its employees as guaranteed in Section 7 of the Act by (1) discharging George B Clark on or about September 5, 1942, and thereafter refusing to reinstate him because he joined and assisted the Union and engaged in concerted activities with other employees for the purpose of collective bargaining and other material aid and protection, and (2) on or about September 5, 1942, and thereafter questioning, urging, persuading and warning its employees against engaging in concerted activities and against their joining and assisting the Union or any labor organization.

Copies of the complaint and notice of hearing thereon were duly served upon the respondent and the Union.¹

Pursuant to the notice a hearing was held March 29 and 30, 1943, at St Louis, Missouri, before J. J Fitzpatrick, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel² All parties participated in the hearing and were granted full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the conclusion of the hearing the parties waived oral argument but were granted an opportunity to file briefs with the undersigned after the close of the hearing. No briefs have been received. After the close of the hearing the undersigned on his own motion ordered certain corrections made in the transcript of record.

Upon the record thus made, and from his observation of the witnesses, the undersigned makes the following:

¹ No answer to the complaint was filed by the respondent. However, at the opening of the hearing H B. Miller, director of personnel, stated on the record that Clark had been laid off by the respondent about September 5, 1942, but denied that the respondent had refused to reinstate him or that it had committed any of the unfair labor practices alleged in the complaint.

² The respondent was also represented by its Director of Personnel Miller and Assistant Director of Personnel Randol.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent is a Maryland corporation and a wholly owned subsidiary of Western Cartridge Company. It is engaged in the manufacture of small arms ammunition for the United States Government at two adjoining plants in St. Louis, Missouri.³ The plants, all the machinery, equipment, and material used, as well as the manufactured products, are owned by the government. In the year 1942, from 90 to 95 percent of the materials used in the manufacturing process amounting in value to several millions of dollars and consisting principally of brass, lead, copper, and chemicals was shipped to the plants from points outside the State of Missouri. The finished products for that year also valued at several millions of dollars were taken over by the government at the plants for use by the armed forces. In the summer of 1942, the employees of the respondent numbered approximately 26,000, but were reduced to about 22,500 in September of that year. In subsequent years the number of employees fluctuated. At the time of the hearing there were approximately 17,000 employees. Since 1942 there has been no material change in the respondent's business.

II THE ORGANIZATION INVOLVED

Brotherhood of Railroad Trainmen is a labor organization admitting to membership certain employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A *Background*

Shortly after the respondent began operations in the fall of 1941, a number of unions, other than the charging union, became interested and active in organizing eligible employees. On February 23, 1943, as the result of charges brought by these other unions, the Board found that in the summer of 1942 the respondent, by the enforcement of too broad a no solicitation rule, and by other specified acts, had interfered with the employees rights under the Act.⁴

In the 300 acres which contained the two plants there are about 17 miles of railroad tracks used for switching cars of material to and from the numerous buildings housing the various departments. In early 1942 there were two switching crews which every month alternated from the day to the night shift. Each shift consisted of an engineer, two switchmen and a switch foreman.⁵ A mechanic employed days only also worked with these crews (referred to sometimes in the record as the railroad crew), which were in charge of Chief Plant Engineer, J. C. Stewart. The respondent also employed Fletcher J. Eifert as yardmaster. Eifert worked on the day shift and, aided by a clerk under him, checked the car loadings and directed switching operations on this shift. It was also his job to anticipate car movements and switching operations on the second shift and to prepare instructions for the switch foreman of that shift. Although he directed the work of the switching crew, the yardmaster was not a part of the railroad department, but was a supervisor in the traffic department. He directly super-

³ The respondent also operates a powder storage area at Tyson, 25 miles from St. Louis

⁴ *U. S. Cartridge Company*, 47 N. L. R. B. 896

⁵ At this time the respondent was operating 7 days a week but the employees worked a 6-day week. This necessitated the employment of some extra switchmen. Switch Foreman Robert C. Stark, hereafter referred to, worked as a foreman 2 days a week and also operated an engine 3 days a week.

vised the work of a clerk under him, and directed the operations of the railroad crew. Although he had no authority to hire and fire, he could effectively recommend changes in the status of these employees including the railroad crew. He was also responsible for the work of all these employees. He was thus vested with substantial supervisory authority.

On June 22, 1942, the amount of business having increased, the respondent hired George B. Clark, an experienced switchman, as assistant yardmaster under Eifert. On September 5, 1942, due to a shortage of materials, about 3500 employees were laid off. At that time the respondent discontinued the recently created position of assistant yardmaster and released Clark. Clark's union activities while in the respondent's employ, his lay-off, and the surrounding circumstances form the basis for the allegations of unfair labor practices.

B. The alleged interference and discrimination

In his newly created position, Clark had the same duties as his superior, Eifert, except that it was confined mostly to the second shift. He reported for work at 2 p. m. before the shift started, checked the location of the railroad cars in the plant, lined up the movement of such cars as were necessary for the second shift, and directed the work of the switching crew on that shift. It was his responsibility to see that the switching operations were properly carried out.

Previous to coming to the respondent Clark had for many years been active in behalf of the Union, and, at the time of his employment, was secretary to one of the Union locals. He was hired by the respondent on condition that he not engage in union activities. Beginning about August 5, 1942, however, Clark, together with Thatcher, vice president of the Local Union, visited all the employees of the switching crews at their homes and, by the end of the month, obtained their application cards for the Union. A committee was then selected by the switching crews, consisting of Clark, Switch foreman Robert C. Stark, and Switchman Arthur A. Taylor, to meet with management and secure a contract.

During this period of organizing, the switching crew wore union buttons at work. Eifert was aware of the union activity but was not cognizant of Clark's leading part therein until September 4. The early afternoon of that day he called Clark into his office and asked him if he (Clark) had "engineered" the union activity among the switching crew: that management had inquired about it from him. Clark in effect admitted that he had been the leader in the movement. Eifert asked if Clark did not realize that if the Union secured a contract that both Eifert and Clark would lose their "authority and control" over the crew. Clark responded that a contract could be drawn that would not interfere with the authority of either of them. Eifert then stated to Clark that the respondent would "not stand" for any organization in the plant.⁶

Following the organization of the employees in the railroad department as above found, Thatcher, the local union official, requested bargaining rights for the Union from the respondent, and also arranged for a conference with management and the union committee. This conference was held the morning of September 5, and was attended by the committee and Thatcher for the Union. The respondent's representatives were R. B. Rickord, then personnel director,

⁶ This finding is based upon the testimony of Clark. Eifert denied any such conversation. The denial is not credited. The finding is buttressed by the testimony of John P. Engeln, Terminal Railroad yard clerk, which testimony Eifert testified he did not "recall" but which is herein credited, that a day or two before September 5, 1942, Eifert discussed the union organizing with Engeln and expressed disapproval of such organizing during war time.

H. B. Miller, then personnel supervisor, and R. H. Roberts, an attorney. Thatcher acted as spokesman and introduced the members of the union committee to the management representatives explaining that Clark was chairman, Stark vice chairman, and Taylor secretary thereof. Thatcher then stated that the committee represented the employees in the switching crews⁷ and desired to negotiate a contract. The management representatives replied that other unions claimed to represent various groups of employees and the appropriateness of the various units would have to be determined by the Board.⁸

The meeting terminated about noon, and Clark reported to work at 2 p. m. Shortly thereafter, Eifert came to Clark, said that he had "bad news", and handed him his termination slip, effective that night; the slip stated that the layoff was due to material shortage.⁹ Eifert told Clark to keep in touch with him and he would see what he could do about getting him back. Thereafter, for about a week, Clark daily phoned Eifert about reinstatement but stopped after being told that there was no place for him. About two weeks later he phoned Personnel Director Rickcord and was told the same thing. Thereafter he made no further effort to be reinstated and has not been called back. At the hearing he testified that he had other employment of a permanent nature on the Pacific coast and did not desire reinstatement.

Switchman Taylor was also laid off because of the material shortage, but was recalled in a day or two.¹⁰

As herein found, Clark was included in the mass lay-off of about 3,500 employees caused by the shortage of materials. After this handicap to operations had been eliminated, later in the fall of 1942, the number of employees again increased. There were several later lay-offs and apparently a wide fluctuation in employment. In December 1943, the employees reached a peak of 34,000, but at the time of the hearing there were about 17,000. Notwithstanding these occasional increases, and the incident increase in the railroad tonnage, no one was hired to replace Clark as assistant yardmaster although there were later increases in the number of employees on the switching crews. After his release, the assistant yard master's duties were performed, as they had been before, by Eifert and the switch foremen.

Notice of a proposed 10 percent lay-off of employees due to material shortage had been posted on bulletin boards in the plants about September 1, 1942. Eifert about that time discussed this notice with Clark and the railroad crew. He told them they were then working shorthanded and he did not believe the lay-off would affect anyone under him.¹¹ The actual lay-off amounted to considerably more than

⁷ The unit intended was apparently the switching crew exclusive of the engineers

⁸ The following December the Board in a consolidated hearing found, *inter alia*, that the switching crew, excluding supervisors, constituted an appropriate unit. *U. S. Cartridge Co.*, 45 N L R B 1043. Prior to the present hearing, the respondent signed a contract with the Union covering this unit.

⁹ The termination form included the question "Would you rehire", after which was typewritten, "Yes".

¹⁰ John P. Engeln, a yard clerk for the Terminal Railroad whose duties in 1942 included part time work in the respondent's yard, testified that a few days after Clark's termination Eifert offered him Clark's job at less pay than Clark had been getting and that he refused the offer. Eifert testified that he offered Engeln a job as clerk under him, but fixed the time as in the spring of 1943. In this respect, Eifert testified that as time went on more detailed records had to be kept in his office and he therefore offered a clerk's job to Engeln but did not offer him a job as assistant yard master. As Engeln's previous experience would hardly have qualified him to be an assistant yard master, the undersigned credits Eifert's version of the conversation and the time as more plausible.

¹¹ This finding is based upon a reconciliation of the testimony of Clark and Eifert relative thereto.

the estimated 10 percent of the employees. All the termination slips were dated September 4, effective Saturday, September 5, 1942, on which date the plant ceased operating on a 7 day weekly schedule and went on a 6 day schedule of work.¹²

The respondent admits that Clark was a capable employee. It contends that as part of the mass lay-off and the switch from a 7 day to a 6 day work week the position of assistant yard master was eliminated. Two or three days after the lay-offs, however, Eifert told Stark, switchforeman, that he was of the opinion that Clark "would be there yet if he hadn't been so active in the Brotherhood."¹³

C *Conclusions as to the unfair labor practices*

The questioning of Clark by Eifert on September 4 relative to the organizing, the former's activity therein, and Eifert's statement that the respondent opposed any organization in the plant, must be considered in the light of Clark's position. He was not an ordinary employee but exercised supervisory duties similar to Eifert though limited to the shift he worked. He received a stated salary and was not entitled to overtime like the employees under him.¹⁴ He could recommend increases in pay and was responsible for the work of the employees whom he directed. It is found that Clark was a supervisor within the meaning of the Act for whose activities in labor matters the respondent would have been held responsible.¹⁵ When Clark took this supervisor's job he agreed not to engage in union activities among the ordinary employees. At that time the charging union to which Clark belonged was not active in the plants, but other unions were, of which fact the respondent was aware. In early September, when rumors came to management that Clark had "engineered" the unionization of the switching crews it properly questioned him as to such activity. Absent any evidence of an effort to organize the supervisors as such, the respondent was justified in requiring its supervisors to remain neutral in union activity and in criticizing its Assistant Yard Master for his failure to do so.¹⁶ The statement that the respondent opposed organization of any kind would under certain conditions be coercive, if used by a supervisor to an ordinary employee. Where, under the

¹² Clark testified that the termination notices covering the announced lay-off were all sent out before September 3, some of them being effective prior to September 5. This testimony is not credited, as the respondent's original records produced in the hearing for inspection showed that all the lay-offs, including Clark's and Taylor's, were effective September 5. Clark also testified that in his observation, which was limited to a time clock containing approximately 250 time cards, it was customary for the respondent to attach the termination slips to the time cards of the employees affected. As previously found, Clark and Taylor were given their termination slips by Eifert. However, Eifert's testimony is uncontradicted and credited that it was the practice of Berry, who was over the railroad department which included the switching crews, either to deliver termination slips in person or leave them with Eifert for delivery to the employees. Clark and a clerk were the only ones directly under Eifert in the traffic department, and the record does not disclose what the practice in this respect was in that department, but any such terminations necessarily would have come through Eifert's hands. No inference of irregularity is warranted, therefore, from the method of handling Clark's or Taylor's terminations.

¹³ This finding is based upon the testimony of Stark. Eifert denied making the statement. In view of all the circumstances above detailed, particularly Eifert's statement to Clark before the dismissal, the denial (which was somewhat uncertain) is not credited.

¹⁴ Clark complained about his pay not equaling those under him who received overtime. As a result of the complaint, about the first of September Eifert agreed to recommend an increase for Clark. In these days of overtime work it is not unusual to find instances where the take-home pay of ordinary workers exceeds the guaranteed salary of the supervisor.

¹⁵ *The Winter-Weiss Co.*, 61 N. L. R. B. 361.

¹⁶ *Cf. Soss Manufacturing Co., et al.*, 56 N. L. R. B. 348.

circumstances here existing, it was used by one supervisor to another there is no element of coercion in it.

Clark held the newly created position of assistant yard master for a little over two months when it was abolished during the mass lay-off. His work was satisfactory and no question is raised as to his capacity to handle the job. The previous finding of unfair labor practices,¹⁷ Eifert's questioning of Clark on September 4 about his union activities, and his statement to Stark after the lay-off that in his judgment Clark would still be in the respondent's employ if he had not been so active for the Brotherhood raise a suspicion that the respondent eliminated the job in order to get rid of Clark. In the opinion of the undersigned, however, this suspicion is more than counterbalanced by other factors. No effort was made to replace Clark or to create another position in lieu of the assistant yard master's job, but the duties thereof were performed by Eifert and the switch foreman as they had been before Clark was hired. In the circumstances incident to a mass lay-off a new position is likely to be abolished in seeking ways to cut down the number of total employees, especially where seniority is given some consideration, as is true with the respondent. It is noted, moreover, that Eifert's comment to Stark after the lay-off was not a statement of fact but merely the expression of a personal opinion that Clark's union activities had to do with his release.

Eifert felt that he was understaffed before the lay-off. Although he knew on September 4 of Clark's activities, management had no suspicion of them until the Committee met on the 5th, unless Eifert previously reported the fact. But Eifert obviously did not anticipate any releases of the employees under him or his direction and was as surprised as Clark was when the latter's termination slip arrived. Furthermore, the 3500 termination slips were prepared not later than September 4. It takes time to prepare such a list, and while Clark's name could conceivably have been added to the list at the last moment, there is no evidence that such was the fact, and the record does not warrant an inference to that effect. In the light of the justified mass lay-off, which amounted to more than the estimated 10 percent, the adjustments that necessarily followed the changing of the work week, the fact that the job of assistant yard master was of recent creation and somewhat of an experiment, the undersigned is of the opinion and finds that the position was eliminated for legitimate reasons.¹⁸

Clark's testimony suggests that even though the assistant yard master position was properly eliminated Clark was not given any consideration (a) because of his seniority, and (b), for a job in the switching crew for which he was qualified and for which he applied. Such seniority procedure as the respondent practiced applied only to classifications of work and not to departments, and Clark held

¹⁷ See footnote 4, *supra*. This was a consolidated hearing as the result of the efforts of several unions to organize the plant guards as well as other employees. The Board found (1) discriminatory treatment of several employees, (2) interference by (a) the enforcement of a too broad "no solicitation" rule which was later rescinded and (b) questioning and threatening plant guards for union activity and disparaging the leaders of the movement.

¹⁸ The release of Clark almost immediately following the verification of the respondent's suspicion that he was engaged in union activity poses the question whether the respondent discharged its Assistant Yard Master because of his failure to remain neutral in union activities, or because of anti-union considerations. The respondent through its Personnel Director Miller did argue that such activity of Clark was illegal, but nevertheless insisted that the sole reason for the discharge was the mass lay-off, as disclosed by Clark's termination slip. Although the severe penalty of discharge of a supervisor for failing to remain neutral in union matters under circumstances such as herein detailed might in any event be justified, the undersigned accepts the respondent's reason for the discharge, as fortified by the record.

the only job classified as assistant yard master. Clark testified that after his dismissal he asked Eifert for a job in the switching crew and Eifert replied that it could "not be done." Eifert was unable to recall any such conversation but testified that if it was mentioned he would have referred Clark to Stewart or Berry. Clark said nothing about a switching job to either of the latter, although they headed the railroad department, nor did he mention it when he talked to the personnel director who would have had to pass on the application. It is found that Clark did not apply for a transfer to the switching crew, but at best merely mentioned the matter to Eifert who had no authority in that respect over the switching crew, of which fact Clark was aware.

It is therefore found that the respondent has not discriminated as to the hire and tenure of employment of George B. Clark, and has not interfered with, restrained or coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Upon 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 United States Cartridge Company, St. Louis, Missouri, occur in commerce within the meaning of Section 2 (6) of the Act.

2. Brotherhood of Railroad Trainmen is a labor organization within the meaning of Section 2 (5) of the Act.

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

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the complaint against the respondent, The United States Cartridge Company, St. Louis, Missouri, be dismissed.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective July 12, 1944, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

J. J. FITZPATRICK,
Trial Examiner.

Dated April 30, 1945.