

In the Matter of THE WALLACE CORPORATION and UNITED CONSTRUCTION WORKERS (DISTRICT 50), U. M. W. A.

Case No. 9-C-1786.—Decided May 27, 1946

DECISION

AND

ORDER

On March 22, 1946, the Trial Examiner 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 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. Pursuant to notice, and at the request of the respondent, the Board heard oral argument on May 9, 1946, in Washington, D. C. The respondent appeared and participated in the argument; no other party appeared.

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, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as modified below.

1. We agree with the Trial Examiner that the discharge of Lawrence Persinger on or about December 9, 1942, because of his failure to maintain membership in and pay dues to the Independent, was violative of Section 8 (3) of the Act. Since it has previously been found that the Independent was a labor organization dominated, interfered with, and supported by the respondent in violation of Section 8 (2) of the Act,¹ the closed-shop contract between the respondent and the Independent was invalid and the discharge of Persinger pursuant to the terms of this contract was not protected by the proviso to Section 8 (3) of the Act.²

¹ *Matter of The Wallace Corporation*, 50 N. L. R. B. 138, enf'd 141 F. (2d) 87 (C. C. A. 4), 323 U. S. 248

² See, e. g., *Sperry Gyroscope Company, Inc. v. N. L. R. B.*, 129 F. (2d) 922 (C. C. A. 2), enf'g 36 N. L. R. B. 1349, *Corning Glass Works v. N. L. R. B.*, 118 F. (2d) 625, enf'g as mod. 15 N. L. R. B. 598; *N. L. R. B. v. Electric Vacuum Cleaner Co.*, 315 U. S. 685.

2. Having found that the respondent discharged Persinger in violation of Section 8 (3) of the Act, we shall order it to cease and desist from engaging in such conduct. Since there is already outstanding against the respondent a decree enjoining it, among other things, to cease and desist from in any manner interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, we do not believe it necessary, in order to effectuate the policies of the Act, to include the same provision in our Order.³ In addition to ordering the respondent to cease and desist from the illegal conduct in which it has engaged, we shall order the respondent to reinstate Persinger with back pay, such action being designed to effectuate the policies of the Act. However, in the circumstances of this case, set forth in the Intermediate Report, we shall limit the award of back pay to the period from February 6, 1946, the date of the issuance of the complaint herein, to the date of the respondent's offer of reinstatement, less Persinger's net earnings during such period.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, The Wallace Corporation, Richwood, West Virginia, and its officers, agents, successors, and assigns shall:

1. Cease and desist from encouraging membership in the Richwood Clothespin and Dishworkers Union, or any other labor organization of its employees, by discharging any employee pursuant to any contractual provision requiring, as a condition of employment, membership in any labor organization which has been established, maintained, or assisted by any action defined in the Act as an unfair labor practice, or in any successor thereto.

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

(a) Offer to Lawrence Persinger immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority and other rights and privileges;

(b) Make whole Lawrence Persinger for loss of pay 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 February 6, 1946, the date of the issuance of the complaint herein, to the date of the respondent's offer of reinstatement, less his net earnings during such period:

³ *Matter of Alabama Fuel & Iron Company*, 62 N. L. R. B. 762.

(c) Post at its plant at Richwood, West Virginia, copies of the notice attached hereto marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by the respondent's 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;

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

CHAIRMAN HERZOG took no part in the consideration of the above Decision and Order.

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 not encourage membership in the Richwood Clothespin and Dishworkers Union or any other labor organization of our employees, by discharging any employees pursuant to any contractual provision requiring, as a condition of employment, membership in any labor organization which has been established, maintained, or assisted by any action defined in the Act as an unfair labor practice, or in any successor thereto.

We will offer to the employee named below immediate and full reinstatement to his former or a substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for loss of pay suffered as a result of the discrimination in the manner set forth in the Board's Decision and Order.

Lawrence Persinger

THE WALLACE CORPORATION,
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

Mr. Harold M. Weston, for the Board.
Wolverton & Callaghan, by *Mr. Brooks B. Callaghan* and *Mrs. Irene Weese Groves*, of Richwood, W. Va., for the respondent.

STATEMENT OF THE CASE

Upon a charge duly filed on January 2, 1943, by United Construction Workers (District 50), United Mine Workers of America, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Ninth Region (Cincinnati, Ohio), issued its complaint dated February 6, 1946, against The Wallace Corporation, Richwood, West Virginia, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3), and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and the charge and notice of hearing thereon were duly served upon the respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance: (1) that on or about December 12, 1942, the respondent discharged employee Lawrence Persinger because of his failure to maintain membership in the Richwood Clothespin and Dish Workers Union, herein called the Independent, a labor organization initiated and sponsored by the respondent in violation of Section 8 (2) of the Act; and (2) by the acts described above, respondent interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On or about February 27, 1946, the respondent filed its answer to the complaint, denying that it had engaged in the unfair labor practices alleged.

Pursuant to notice a hearing was held at Summersville, West Virginia, on March 12, 1946, before Peter F. Ward, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and respondent were represented by counsel. All parties 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 close of the hearing, counsel for the Board moved, without objection, that the pleadings be amended in formal matters to conform to the proof. The motion was granted. Oral argument by counsel for the parties was heard at the close of the hearing which was included in the transcript of the proceedings. While the parties were afforded an opportunity to file briefs with the undersigned, no briefs have been received.

Upon the entire record in the case, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent, a Missouri corporation, is engaged in the manufacture, sale and distribution of clothespins, wood, and paper food trays. It operates a plant at Richwood, West Virginia, which is the only one involved in this proceeding. The principal raw material used is wood, nearly all of which originates in the State of West Virginia. During the year immediately preceding the hearing, the respondent purchased and processed at its Richwood plant raw materials valued in excess of \$100,000. During the same period the respondent sold and distributed from its Richwood plant products valued in excess of \$200,000, over 75 percent

of which was shipped to points outside the State of West Virginia. The respondent concedes that it is engaged in commerce within the meaning of the Act, and the Board has heretofore so found.¹

II. THE ORGANIZATION INVOLVED

United Construction Workers (District 50), United Mine Workers of America, is a labor organization admitting to membership employees of the respondent, and Richwood Clothespin and Dishworkers Union, unaffiliated, was prior to its disestablishment as provided by an order of the Board,² a labor organization admitting to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

The discriminatory discharge of Lawrence Persinger

(a) Events antedating the discharge³

The record herein, in brief, discloses: (1) that during the summer of 1941 the United Construction Workers Organizing Committee, herein called the United, began organization activities at the respondent's Richwood plant; (2) during September 1941 it demanded recognition which was denied; (3) a strike was called by United on September 25, 1941, and continued until January 13, 1942; (4) during the first week in October 1941, the Independent came into existence; (5) on January 13, 1942, the respondent, the United, and the Independent signed an agreement providing, *inter alia*, for immediate resumption of plant operations and for the conduct of an election by the Board to determine whether the United or the Independent represented a majority of the respondent's employees; (6) by such agreement the respondent agreed to enter into a closed-shop agreement with the organization that won the election; (7) on January 19, 1942, the respondent and the United entered into an agreement, approved by the Board's Regional Director, which provided, *inter alia*, for the settlement and withdrawal of charges theretofore filed by the United; (8) also on January 19, 1942, the respondent, the United, and the Independent, entered into a separate consent election agreement, approved by the Board's Regional Director, which designated both unions as candidates for representative in an election to be held on January 30, 1942; (9) at the election the Independent received a majority of the votes cast;⁴ (10) on February 4, 1942, the Regional Director in his Report on Election found and determined that the Independent had been designated exclusive bargaining representative by a majority of the employees; (11) no objections were filed to such Report on Election; (12) and under date of March 7, 1942, the respondent entered into a closed-shop contract with the Independent.

¹ 50 N. L. R. B. 138.

² See next preceding footnote.

³ The record made herein was stipulated by the parties and no witnesses were called. The parties also stipulated that judicial notice of the Board's Decision and Order in *Matter of The Wallace Corporation*, 50 N. L. R. B. 138, together with the Decision of the Circuit Court of Appeals, 141 F. (2d) 87, and the Decision of the U. S. Supreme Court, 323 U. S. 248, in the said case, be taken. The findings made herein are based in part upon the findings of the Board in the above case.

⁴ Of 207 eligible employees, 98 voted for the Independent, 83 for the United, and 5 votes were cast for neither.

On March 18, 1942, the respondent discharged 43 employees who were members of the United for the reason that they had not become members of the Independent. As a result of the 43 discharges the United, on June 25, 1942, filed a second amended charge upon which the Board issued its complaint alleging that the respondent had violated Section 8 (1), (2) and (3) of the Act. During July 1942, a hearing upon such complaint was held before a Trial Examiner for the Board. On September 2, 1942, the Trial Examiner issued his Intermediate Report, copies of which were served upon all the parties, in which he found that the respondent had engaged in unfair labor practices within the meaning of Section 8 (1), (2) and (3) and Section 2 (6) and (7) of the Act.

(b) The discharge

The complaint alleges, in substance, that Persinger was discriminatorily discharged by the respondent on or about December 12, 1942, because of his failure to maintain membership in the Independent, a labor organization initiated and sponsored by the respondent in violation of Section 8 (2) of the Act.

The answer admitted that the respondent discharged Persinger on or about December 12, 1942, and alleged that it did so pursuant to the terms of the then existing closed-shop contract described above.

Persinger was employed from on or about June 30, 1941, until on or about December 9, 1942, when he was discharged on the request of the Independent for non-payment of dues. Persinger had joined the Independent, paid initiation fees and dues and remained a member thereof until he became in arrears in the payment of dues. At the time of his discharge he was employed as a trucker in the wood pin department. On January 2, 1943, the Union filed a charge alleging that Persinger's discharge was a discriminatory one. During January 1943, the Board's Regional Director proposed to respondent's counsel that the Board and the respondent, by stipulation, incorporate the charges alleging discrimination against Persinger, in the prior proceeding against the respondent, then pending before the Board. Respondent's counsel refused to so stipulate and the issuance of the complaint herein was held in abeyance until said prior proceeding was fully litigated.

(c) Events occurring subsequent
to the discharge

Following the issuance and service of the Intermediate Report, above referred to, and the filing of exceptions thereto the Board, under date of June 7, 1943,⁵ found (1) that the Independent had been set up, maintained, and used by the respondent to frustrate the unionization of its plant by the United; and (2) the "union shop" contract was made by the respondent with knowledge that the Independent intended to use the contract as a means of bringing about the discharge of former United members by denying them membership in the Independent. The Board held, *inter alia*, that the conduct of the respondent in both instances constituted unfair labor practices. It ordered the respondent to disestablish the Independent and to cease and desist from giving effect to the closed-shop contract. The Circuit Court of Appeals ordered enforcement of the Board's Order.⁶ Subsequently the Supreme Court of the United States affirmed the judgment of the Circuit Court of Appeals "approving the order of the Board in its entirety."⁷

⁵ 50 N. L. R. B. 138.

⁶ 141 F. (2d) 87.

⁷ 323 U. S. 248.

(d) Contentions of the respondent
as to the discharge

The respondent contends in substance and effect: (1) that it was obligated by its agreement with the United and Independent to enter into a closed-shop agreement with the organization which won the election; and (2) that while the Board and the Courts held the closed-shop contract to be illegal and to have been entered into with an organization that had been established, maintained, and assisted by the respondent, such holding was based on the premise that certain employees had been discharged "because of prior union activity," an element not present in Persinger's case, since he had joined the Independent and paid dues for a time.

It is clear from the record that the validity of the closed-shop contract was fully litigated in the first case and determined adversely to the respondent. The Board and the Courts found the contract to be illegal and one entered into with a creature of the respondent. The fact that 43 employees were discharged "because of prior union activity" and Persinger was discharged because of his failure to maintain membership in a "company dominated" organization is immaterial as in both instances the employees were discharged pursuant to the terms of an illegal contract. Since the contract is illegal the respondent cannot rely upon the proviso⁸ to Section 8 (3) of the Act as a defense

This contention is without merit.

(e) Conclusions as to the discharge

From the foregoing and the record, it appears and the undersigned finds, that the respondent discharged Lawrence Persinger on or about December 9, 1942, because of his failure to maintain membership in and pay dues to the Independent, a labor organization theretofore initiated and sponsored by the respondent; that by said discharge it discriminated with respect to Persinger's hire and tenure of employment and conditions of employment, thereby encouraging membership in the Independent and discouraging membership in the United, and interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

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's business 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.

V. THE REMEDY

Having found that the respondent has engaged in certain unfair labor practices, the undersigned will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

⁸ Provided, That nothing in this Act, . . . shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, * * *

It has been found that the respondent discriminated in regard to the hire and tenure of employment of Lawrence Persinger by discharging him because of his failure and refusal to maintain his membership in the Independent, a labor organization initiated and sponsored by the respondent in violation of the Act for the purpose of encouraging membership in the Independent and discouraging membership in the Union. In order to effectuate the policies of the Act, it is recommended that the respondent offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and that it make him whole for any loss of pay he may have suffered by reason of the discrimination practiced against him, by payment to him of a sum of money equivalent to that which he normally would have earned as wages from December 9, 1942, to the date of the offer of reinstatement, less his net earnings⁹ during said period.

In view of the unfair labor practices found to have been committed by the respondent, constituting violation of Section 8 (1) as well as Section 8 (3) of the Act, each of which violations grew out of the respondent's violation of Section 8 (2) and (3) as found by the Board in the first case, the undersigned is of the opinion and finds that there is danger of the commission of other and additional unfair labor practices in the future. The unfair labor practices thus far engaged in by the respondent have led to discrimination of such a degree as would cause the average employee to conclude that any union or concerted activity on his part would lead to a loss of his job. This disclosed attitude of the respondent toward organization by its employees and the continuing threat which it implies, requires a cease and desist order as broad as the threat.

It will therefore be recommended that the respondent cease and desist from in any manner interfering with, restraining, and coercing its employees in their rights to self-organization for the purposes of collective bargaining as guaranteed in Section 7 of the Act.¹⁰

Upon the basis of the above findings of fact and the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. United Construction Workers (District 50) United Mine Workers of America, 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 Lawrence Persinger, thereby discouraging membership in a labor organization, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

3. 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 (1) of the Act.

⁹ 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 than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N. L. R. B.* 311 U. S. 7.

¹⁰ See *May Department Stores Company, etc. v. N. L. R. B.*, 326 U. S. 376; *Matter of Washington National Insurance Co.*, 64 N. L. R. B. 929; *Matter of C. D. Beck & Company*, 63 N. L. R. B. 1426; *Matter of Carolina Mills, Inc.*, 64 N. L. R. B. 200.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that The Wallace Corporation, Richwood, West Virginia, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in United Construction Workers (District 50), United Mine Workers of America, or any other labor organization of its employees, by discharging and refusing to reinstate any of its employees or in any manner discriminating in regard to their hire and tenure of employment or any terms or conditions of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist United Construction Workers (District 50), United Mine Workers of America, 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 or protection as guaranteed in Section 7 of the Act.

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

(a) Offer Lawrence Persinger immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges;

(b) Make whole the said Lawrence Persinger for any loss of pay 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 during the period from December 9, 1942, the date of his discharge, to the date of respondent's offer of reinstatement, less his net earnings during such period;

(c) Post at its plant at Richwood, West Virginia, copies of the notice attached hereto marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by the respondent's 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;

(d) File with the Regional Director for the Ninth Region, on or before ten (10) days from the receipt of this Intermediate Report, a report, in writing, setting forth in detail the manner and form in which the respondent has complied with the foregoing recommendations.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective November 27, 1945, 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 25, D. C., an original and four copies of a statement in writing, setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or the 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 within ten (10) days from the date of the order transferring the case to the Board.

PETER F. WARD,
Trial Examiner.

Dated March 22, 1946.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to recommendations of a Trial Examiner 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 not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist United Construction Workers (District 50), U. M. W. A., 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 or protection.

We will offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

Lawrence Persinger

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

THE WALLACE CORPORATION,
Employer.

By.....
(Representative) (Title)

Dated.....

Note: Any of the above-named employees presently serving in the armed forces of the United States will be offered full reinstatement upon application in accordance with the Selective Service Act after discharge from the armed forces.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.