

In the Matter of THE PARAFFINE COMPANIES, INC. and INTERNATIONAL
LONGSHOREMEN AND WAREHOUSEMEN'S UNION, LOCAL 6, C. I. O.

Case No. 20-C-1510.—Decided February 11, 1948

Mr. Robert E. Tillman, for the Board.

Messrs. Marion B. Plant and Samuel L. Holmes of Broebuck,
Phleger and Harrison, of San Francisco, Calif., for the respondent.

DECISION
AND
ORDER¹

On December 20, 1946, Trial Examiner Thomas S. Wilson issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had not violated Section 8 (1) or (3) of the Act² as alleged in the complaint and recommending that the complaint against the respondent be dismissed. Thereafter, counsel for the Board filed exceptions to the Intermediate Report and a supporting brief, and the respondent filed a brief concurring in the Intermediate Report. None of the parties requested oral argument before the Board.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-man panel consisting of the undersigned Board Members.*

The Board has reviewed the rulings of 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,³ and recommendation of the Trial Examiner, as set forth in the copy of the Intermediate Report attached hereto.

¹ The power of the Board to issue a Decision and Order in a case such as the instant one, where the charging union has not complied with the filing requirements specified in Section 9 (f), (g), and (h) of the National Labor Relations Act, as amended, was decided by the Board in *Matter of Marshall and Bruce Company*, 75 N. L. R. B. 90

² The provisions of Section 8 (1) and (3) of the National Labor Relations Act, which the Trial Examiner herein found were not violated, are continued in Section 8 (a) (1) and 8 (a) (3) of the Act as amended by the Labor Management Relations Act, 1947

*Chairman Herzog and Members Reynolds and Murdock

³ Like the Trial Examiner, we find that the facts in this record make the case wholly distinguishable from *Matter of Clumax Engineering Company*, 66 N. L. R. B. 1359.

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 complaint issued herein against the respondent, The Paraffine Companies, Inc., Emeryville, California, be, and it hereby is, dismissed.

INTERMEDIATE REPORT

Mr. Robert E. Tillman, for the Board.

Messrs. Marion B. Plant and Samuel L. Holmes of Brobeck, Phleger and Harrison, of San Francisco, Calif., for the respondent.

STATEMENT OF THE CASE

Upon a first amended charge duly filed on August 15, 1946, by International Longshoremen and Warehousemen's Union, Local 6, C. I. O., herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Twentieth Region (San Francisco, California), issued its complaint dated September 18, 1946,¹ against The Paraffine Companies, Inc., herein called the respondent, alleging that it has engaged in and is 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 accompanied by 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 that on or about October 31, 1945, the respondent promulgated and adhered to a policy that its foremen could not be continued as, and non-supervisory employees could not be promoted to, the position of foremen so long as they remained affiliated with labor organizations representing the respondent's rank and file employees, thereby engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

Thereafter, on September 27, 1946, the respondent filed its answer in which it denied each and every allegation of the complaint.²

Pursuant to notice a hearing was held at San Francisco, California, on October 21 and 22, 1946, before the undersigned, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent 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 close of the hearing the undersigned granted without objection, a motion by counsel for the Board to conform the pleadings to the proof in respect to formal matters. At the close of the hearing, counsel for the Board and counsel for the respondent argued the matter, and subsequently the respondent has filed a brief with the undersigned.

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

¹The Board was allowed to amend its complaint by making a few changes in the phraseology thereof at the hearing over the respondent's objection. This amended complaint will be referred to herein as the complaint.

²It was agreed at the hearing that the respondent's answer would be deemed to deny the allegations of the amended complaint.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Paraffine Companies, Inc., is a Delaware corporation maintaining its principal offices in San Francisco. It operates, among others, a plant at Emeryville, California, where it is engaged in the manufacture and sale of linoleum, floor coverings, paints, and roofing and building materials. During the fiscal year ending June 30, 1946, the respondent purchased raw materials and supplies for use at its Emeryville plant, having a value in excess of \$2,000,000, of which more than 60 percent represents the value of such materials and supplies shipped to the said plant from States of the United States other than the State of California and from foreign countries. During the same period, the respondent manufactured products at its Emeryville plant, having a value in excess of \$5,000,000, of which more than 70 percent was sold and shipped to customers located in States and Territories of the United States other than the State of California and in foreign countries.

For the purpose of this proceeding the respondent agrees that in the operation of its Emeryville plant, it is engaged in commerce within the meaning of the Act.³

II. THE ORGANIZATION INVOLVED

The International Longshoremen and Warehousemen's Union, Local 6, C. I. O., is a labor organization admitting to membership employees of the respondent.

III THE UNFAIR LABOR PRACTICES

A. Interference, restraint, and coercion; discrimination in regard to tenure of employment

At its Emeryville plant, the respondent has 11 companies within one enclosure. Within that enclosure there are 18 separate and distinct bargaining units wherein the employees are represented by various AFL, CIO and independent unions for the purposes of bargaining with the respondent. The respondent appears to have been able to maintain very cordial relations with each and all of the various unions and to have made an enviable reputation in labor relations by its activities in that field.

The present case relates exclusively to men employed as supervisory foremen in the respondent's roofing department. In this department there are 3 supervisory foremen, one for each of 3 shifts which they work in rotation. These supervisory foremen work under the direct supervision of the chief supervisor. A supervisory foreman is responsible for the production of the department and for the crew of 40 or 50 employees on the particular shift he happens to be working at the time. When employed on the night shift, such foreman is in full charge of the department, being the highest official in the department at that time. He does no manual labor, being restricted solely to supervision by the agreement between the respondent and the Union. He can recommend the hiring of individuals and has the authority to discipline, transfer and discharge employees under his jurisdiction. The supervisory foreman is paid a monthly salary of \$335, while the production and maintenance workers receive \$1.40 or \$1.50 rate per hour. Based on an agreement between the respondent and the

³ These findings are based on a stipulation entered into by the parties at the hearing.

Union the Board has excluded supervisory foremen from the appropriate unit for the production and maintenance workers on the ground that they were supervisory employees.⁴ There can be no question, and the undersigned finds, that the supervisory foreman is in a supervisory capacity for the respondent.

Since 1940 the Union has been recognized by the respondent and has had a closed-shop agreement with the respondent covering "all employees" in the roofing department. "Appendix A" to this agreement indicates that supervisory foremen are not covered by this agreement as this appendix makes no provision in regard to their salary. The undersigned therefore finds that supervisory foremen are not covered by the agreement between the Union and the respondent.

In May 1946, two positions as supervisory foremen became vacant in the roofing department. As apparently was customary in the plant, the respondent proposed to fill such positions by promotion and informed certain of its employees, including Joseph Lusiani, Abram Fishburn and Ernest Abreu, that they were under consideration for promotion to these positions. Each of these employees, all members of the Union, was informed by Assistant Plant Manager Prifold or Roofing Department Superintendent John Varley of the respondent's policy concerning the union affiliation of such foremen. This policy is contained in the following documents, which each man was handed to read:

FOREMEN

I. Status of Present Supervisory Foremen.

1. All Supervisory Foremen must become Management representatives without equivocation and must assure the Company that they are no longer affiliated with Labor Organizations which represent the daily workers.

2. Those who will not agree to the above will be told that we can no longer employ them as foremen. Two avenues will be open to them:

(a) They can resign as foremen and go back into the ranks.

(b) They can leave the employ of the Company and receive severance pay of one month for each five years of service.

3. Those who decide to remain as foremen will be told that they hold their jobs only through their own ability and if they are unable to fill their jobs satisfactorily at any later date they will be terminated with severance pay as in 2. (b) above.

II. For Employees selected in the future to become Supervisors

1. When the promotion is proposed the employee will be told that he is taking the step on his own responsibility and with the knowledge that if he does not fill the job satisfactorily he will be terminated with severance pay as in 2. (b) above.⁵

Within a few days of his interview Abreu informed Varley that he did not care to "give up his book" i. e., withdraw from the Union, and therefore requested that he not be considered for promotion.

Lusiani and Fishburn, on the other hand, secured withdrawal cards from the Union and were appointed to the vacant positions in which they were continuing to serve up to and including the time of the hearing.

⁴ In re *Paraffine Companies, Inc.*, 25 N. L. R. B. 752 and 27 N. L. R. B. 197.

⁵ Uncontradicted evidence indicates that the above had been the company policy since 1937 although it was first put in written form in October 1945. The undersigned so finds. It further appeared that the respondent had no objection to the unionization of its supervisory foremen as such, but only objected to their retaining membership in the union representing the rank and file hourly employees.

Concluding findings

In a number of rather recent cases the Board has held⁶ and has been sustained by the Courts⁷ that foremen are "employees" within the meaning of the Act and, as such, are entitled to the protection of Section 8 (1) and (3) of the Act. This is so whether the foremen are members of a labor organization affiliated with that representing the production and maintenance employees⁸ or, indeed, are members of the same organization.⁹

Under facts quite analogous to those presented here, the Board held in the *Climax* case, cited above, that "the respondent, by requiring the foremen to resign from the Union or suffer demotion, interfered with their right to remain members of the Union [representing the production and maintenance employees]," violated Section 8 (1) and, by "demoting them when they refused to resign from the Union," violated Section 8 (3) of the Act. In speaking of the other issue presented in the *Climax* case, to wit: whether the employer had the right to require a foreman to desist from wearing his rank and file union button at work, the Board said.

In the instance case, it is true, Meyer and Engstrom [foremen] also wore buttons indistinguishable from those worn by rank and file employees, thereby superimposing upon mere passive membership an open and active support of the Union among rank and file employees. We are therefore here faced with the need of balancing the right of supervisors to self-organization under Section 7 of the Act against the right of rank and file employees to be free of supervisory interference. We conclude on the facts of this case that, in contrast with *mere passive membership*, the wearing of union buttons by supervisors, indistinguishable from those worn by rank and file employees, may form a barrier, though no doubt a slight one, to the full exercise by subordinates of their freedom of choice. The respondent would consequently have been entitled to take appropriate steps to protect its neutrality. It would have been appropriate, for example, for the respondent to have required Meyer and Engstrom to remove and thereafter refrain from wearing the rank and file union buttons and to have demoted them if they failed to comply with its request [Italics supplied.]

Apparently conceding the correctness of the law as stated by the Board, the respondent argues that it was merely taking necessary and appropriate steps in order to maintain and preserve its own neutrality between the numerous unions in the plant when it formulated and adhered to its policy that its supervisory foremen and candidates for that position had to give up their affiliation with the union representing the production and maintenance employees upon promotion to that position. The facts show that this condition

⁶ *Matter of Soss Manufacturing Co.*, 56 N L R B 346; *Matter of Packard Motor Car Company*, 61 N L R B 4 and 64 N L R B 1212; *Matter of L. A. Young Spring and Wire Corp.*, 65 N L R B 298; *Matter of The B. F. Goodrich Company*, 65 N L R B 294; *Matter of Simmons Company*, 65 N L R B 984; *Matter of Jones and Laughlin Steel Corporation*, 66 N L R B 386

⁷ *N L R B v Packard Motor Car Company*, 157 F. (2d) 80 (C C A 6), rehearing denied 18 L R R. M 24. 32, *N. L. R. B. v. Armour and Company*, 154 F. (2d) 570 (C C A 10). *N L R B v. Skinner and Kennedy Stationery Company*, 113 F (2d) 667 (C C A 8)

⁸ *Matter of Eastern Gas and Fuel Associates*, 68 N L R B 324

⁹ *Matter of Climax Engineering Company, Division of General Finance Corporation.* 66 N L R B 1359

was satisfied so far as the company was concerned when the supervisory foremen secured a withdrawal card from the Union.

The respondent points to various obligations of the Union's Constitution, By-Laws and Declaration of Principles to which each member was required to adhere as being in direct conflict with the foremen's obligation to the employer and which would, of necessity, violate the respondent's policy of neutrality.

The Constitution, By-Laws and Declaration of Principles of the Union provide for only one type of membership, whether the member be a production worker or a foreman. Every member is obligated to comply with the Constitution and Declaration of Principles of the Union. By these documents he is under the "duty to serve the local when called upon," he is eligible for office, he must attend Union meetings and vote on measures presented there, he must wear his "union button on the job at all times," he must prefer charges against brother members for violations of their obligations and appear as a witness against them, he is subject to the same charges being brought against him, and to fines, suspension or expulsion upon conviction thereof. Among the Declaration of Principles which he, as a member, subscribes to are to be found the following:

2. All rights and duties belong, without discrimination, to each member of this organization as long as they comply with the constitution and by-laws.

* * * * *

8. To organize the unorganized on an industrial basis instead of the out-moded, undemocratic craft union structure, which divides workers and weakens their bargaining power

9. To assist other unions whenever possible in their resistance to attacks on their wages and working conditions and for the attainment of their demands and to honor legitimate picket lines.

* * * * *

10. Basing ourselves upon these principles, we are determined to do everything within our power, individually and collectively, to promote the best interests of our members in pursuit of these aims by:

(a) Maintaining democratic rank and file control of our union.

* * * * *

In other words, it is obvious that a foreman who fulfills his sworn obligations under the Union Constitution, By-Laws and Declaration of Principles, as they exist today,¹⁰ could not retain "mere passive membership" in the Union as was contemplated by the Board in the *Chumax* case. It is also clear that in fulfilling these obligations to the Union, the foreman would violate the respondent's neutrality while performing his duties as a foreman. And even more important is the fact that by actively participating in the affairs of the Union as required by those documents, the foreman must necessarily violate his obligation to the Union of "maintaining democratic rank and file control of our union." The Board has already passed upon the right of the employer to require its foremen to abstain from wearing their union buttons on the job as required by the Union's rules.

¹⁰ The undersigned notes that the Constitution of the Union in evidence here was adopted June 1, 1946, a few days subsequent to the events involved herein, but assumes that this Constitution contained, if any, only minor changes in the substantive obligations of the members

It thus appears that these conflicting obligations imposed upon a foreman by his position with the employer and by his obligations to the Union, create real and present dangers to the respondent, the Union and the foreman himself from the active membership role required of all union members under the present union obligations. Especially is this so with respect to the present respondent, due to the number of differently affiliated unions with which it deals. Nor does the undersigned believe that, in a case such as this is, the respondent should be required to wait patiently until its foremen have done some overt act, required by his obligation to the Union, and jeopardized the respondent's good relations with the unions before it is permitted to take the "appropriate steps" to protect those relations.

Unlike the *Climax* case, the undersigned believes and therefore finds, that the respondent here was motivated in adopting its policy toward union membership of its foremen, not by any opposition to unionization of its foremen as such¹¹ but rather by a sincere desire to preserve its neutrality and its present good relations with the unions in the plant.

Also unlike the *Climax* case, the foremen here are not retaining their membership in the Union in order to save certain financial benefits built up through their previous membership in the Union, as the Union has no such financial benefits. The foremen are protected, so far as retaining the assistance of the Union in obtaining other employment some time in the indeterminate future, by reason of taking out withdrawal cards from the Union.

Under all the circumstances and under all the facts of this case, the undersigned finds that the respondent, by promulgating and adhering to its policy whereby supervisory foremen and applicants for such positions are required, upon promotion to that position, to withdraw from the Union of the maintenance and production workers, took appropriate steps to preserve its neutrality and did not violate Section 8 (1) or (3) of the Act. It will therefore be recommended that the complaint be dismissed.

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

CONCLUSIONS OF LAW

1. International Longshoremen and Warehousemen's Union, Local 6, C. I. O., is a labor organization within the meaning of Section 2 (5) of the Act.
2. The respondent has not interfered with, restrained, or coerced its employees, nor discriminated in regard to their tenure of employment in violation of Section 8 (1) or 8 (3) of the Act.
3. Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATION

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned hereby recommends that the complaint against The Paraffine Companies, Inc., be dismissed in its entirety.

As provided in Section 203.39 of the Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946, any party or counsel for the Board may, within fifteen (15) days from the date of service

¹¹ Even Board witnesses testified that the respondent had indicated no opposition to the unionization of its supervisory foremen.

of the order transferring the case to the Board, pursuant to Section 203.38 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; and any party or counsel for the Board may, within the same period, file an original and four copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, 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. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.65. As further provided in said Section 203.39, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

THOMAS S. WILSON,
Trial Examiner.

Dated December 20, 1946.