

### Recommendations

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in the case, the undersigned hereby recommends that the complaint herein be dismissed in its entirety.

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F. BURKART MANUFACTURING COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, A. F. L. *Case No. 14-CA-576. September 28, 1951*

### Decision and Order

On June 13, 1951, Trial Examiner Bertram G. Eadie issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

The Board<sup>1</sup> has reviewed the rulings made by the Trial Examiner at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.<sup>2</sup>

### Order

Upon the entire record in this 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 herein against F. Burkart Manufacturing Company, Cairo, Illinois, be, and it hereby is, dismissed.

### Intermediate Report

#### STATEMENT OF THE CASE

Upon an amended charge filed February 26, 1951,\* by International Association of Machinists, A. F. L., the General Counsel of the National Labor Relations Board,

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

<sup>2</sup> Because the Act restricts only the power of the Board to certify a nonguard union for guards and places no restriction on the right of guards to join nonguard unions, we do not adopt the Trial Examiner's finding that "as a guard or watchman Boerschel was not privileged to become a member of the union represented by Rushing nor of the Upholsterers' International Union of North America, AFL." Nor do we adopt the Trial Examiner's finding that Rushing testified credibly that the IAM "was the bargaining agent in the plant at that particular time."

\*Original charge filed December 5, 1950.

herein referred to as the General Counsel, and the National Labor Relations Board, herein referred to as the Board, by the Regional Director for the Fourteenth Region (St. Louis, Missouri), issued a complaint against F. Burkart Manufacturing Company, herein referred to as the Respondent. Copies of the charges and of the complaint were duly served on the Respondent. The complaint alleged 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 referred to as the Act.

With respect to the unfair labor practices, the complaint alleges that the Respondent: (a) On or about November 27, 1950, discharged Albert E. Boerschel and thereafter failed and refused, and does now fail and refuse, to reinstate him to his former or equivalent position; (b) discharged and failed and refused, and does now fail and refuse, to reinstate the said Boerschel because he engaged in concerted activities with other employees for their mutual aid and protection and for the purpose of discouraging membership in a labor organization.

The Respondent failed to file an answer.

Pursuant to due notice, a hearing was scheduled and held on April 16 and 17, 1951, at Cairo, Illinois, before the undersigned Bertram G. Eadie, a Trial Examiner, duly designated by the Chief Trial Examiner. The General Counsel, the International Association of Machinists, A. F. L., herein referred to as the Union, and the Respondent were represented at the hearing. All parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

A motion was made by General Counsel for judgment on the pleadings as the Respondent had failed to file an answer, but with the consent of the General Counsel the motion was withdrawn and the Respondent was permitted to plead a general denial as and for its answer, excepting however therefrom the jurisdictional allegations of the complaint which the Respondent admitted. A further motion was made by the General Counsel to amend the pleadings to conform to the evidence, as to dates, etc. The motion was granted upon the consent of the Respondent.

The Respondent moved to dismiss the complaint at the close of the General Counsel's case and again at the close of the whole case on the grounds that (a) the complaint herein relates to alleged activities concerning a watchman who was without the purview of the unit which was in existence by proper bargaining in a labor contract between the Company and the Upholsterers' International Union of North America, and (b) no relief can be granted by this tribunal. Decisions were reserved on the motions and are now denied.

Both counsel argued orally at the close of the whole case. Counsel for the General Counsel has submitted a brief to the Trial Examiner; none has been received from counsel for the Respondent.

Upon the entire record in the case, from his observation of the witnesses, and the exhibits in evidence, the Trial Examiner makes the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE RESPONDENT

The Respondent is a corporation duly organized under and existing by virtue of the laws of the State of Missouri, with its principal office and place of business located in St. Louis, Missouri, and branch factories located in various States of the United States, with an installation branch manufacturing establishment located at Cairo, Illinois.

The Respondent is primarily engaged at its establishment in Cairo, Illinois, in the manufacture of bats and pads.

The Respondent, during the course and conduct of its business at the said Cairo, Illinois, establishment, during the calendar year ending December 31, 1950, purchased raw materials consisting principally of sisal and rubber, valued in excess of \$1,000,000, of which more than 50 percent was transported from points outside the State of Illinois to the Respondent's plants at Cairo. During the same period, the Respondent manufactured, sold, and distributed finished products consisting principally of seat pads for automotive vehicles, valued in excess of \$1,000,000, of which more than 50 percent was transferred from its place of business in said Cairo, Illinois, to points outside the State of Illinois. The Respondent conceded that it is engaged in commerce within the meaning of the National Labor Relations Act.

The Trial Examiner finds that Respondent is engaged in commerce within the meaning of the Act.

## II. THE LABOR ORGANIZATIONS INVOLVED

International Association of Machinists, A. F. L.; Upholsterers' International Union of North America and its Local 702, AFL; and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, are labor organizations within the meaning of Section 2 (5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. *Facts on which the General Counsel relies to constitute a prima facie case against the Respondent*

Albert E. Boerschel was employed by the Respondent as a guard or watchman at its Cairo, Illinois, plant. His duties consisted of attending at the gate and making hourly rounds of the buildings, during his shift, watching through the plant for fires or anything of that kind. His instructions when he was first employed were to keep the gate closed and locked except during the hours of 4 to 5 and 8 to 9 p. m. He opened the gate at 7 p. m. to let the oilers out and again at the luncheon period at 8:15 p. m. He had been issued a key to the lock by Respondent. At the material times mentioned herein he worked on the shift from 4 p. m. to 1 a. m.

The plant consisted of approximately 25 acres and was entirely fenced. About 6 acres were devoted to buildings which were substantially constructed of steel and concrete some of which were two stories in height.

The watchman's station while he was not engaged in making his rounds of the premises was located in a small gatehouse, low ceilinged and heated by steam, at the junction of the plant roadway and the highway, within a few feet of the gate and also within the enclosed premises. It was approximately 1,000 feet from the main buildings, which were reached by the roadway. The watchman's station and interior of the building could readily be seen from the gate; and likewise, the gate and anyone standing in its vicinity were observable from the watchman's post.

The plant at the material times mentioned herein was operating on a 2-shift schedule, 8 a. m. to 3:45 p. m., and 4 p. m. to 1 a. m., with luncheon periods of 45 minutes each at 12 p. m. and 8:15 p. m. Approximately 300 employees were engaged in the operation, about 200 of them working on the 8 a. m. to 4 p. m. shift and the balance of approximately 100 on the 4 p. m. to 1 a. m. shift.

On November 27, 1950, while Boerschel was in the gatehouse he was approached by Herbert Rushing who informed him that he represented the International Association of Machinists and that he was looking for an employee of the Respondent from whom he had received a telephone call; and whom he had promised to meet at the plant that evening at the luncheon period. Boerschel recognized him as an acquaintance of several years' standing. Rushing did not know the name of the employee for whom he was seeking, but described him as a shop steward in the plant. Boerschel could not place him and told Rushing that he would have to wait outside of the plant gate and possibly he would see the man coming out of the plant at the luncheon period which would be only a few minutes later.

As a guard or watchman Boerschel was not privileged to become a member of the union represented by Rushing nor of the Upholsterers' International Union of North America, AFL.

As requested, Rushing waited outside the gate and while there Robert B. Morrow, a vice president of the Respondent in charge of the Cairo plant, who was leaving the plant in his auto sometime after 8:20 p. m. approached him and asked, "Are you a labor representative?" Rushing answered, "I am sir, I represent the International Association of Machinists." Morrow then made a remark to Rushing as follows, "By God, I'll take care of that." Morrow then turned around and walked back inside the gate and asked Boerschel ". . . if I knew that man out there. I said yes, I know him and family years ago, but hadn't for several years. He said, 'do you know his name' I said I can't recall his name but I know him by the name of Butch. That was all he said and left." Morrow then got in his automobile and left the premises. During the period between 7:30 p. m. and 9 p. m. the gate was wide open, allowing individuals and vehicles to enter and depart from the premises.

The next day Boerschel was discharged by Hester Humphrey, the plant superintendent, and was given as the reason for his discharge, "Well you left the gate open and a union man was out there."

Prior to that time the Upholsterers' International Union of North America, AFL, and its Local 702 had entered into a collective bargaining agreement with the Respondent which provided that it should be continued in effect until March 28, 1951, and thereafter automatically renewed unless terminated by either party on notice to the other in writing at least 60 days prior to March 28, 1951. On October 13, 1950, the Respondent and the Upholsterers executed a supplement agreement which, *inter alia*, extended the expiration date of the contract to March 28, 1952. On October 11, 1950, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, filed its petition with the Board for certification, alleging therein that Upholsterers' Union was the then recognized or certified bargaining agent of the Respondent. The Board granted the petition and set a date for an election to be held subsequent to the date of the hearing.

Herbert Rushing, international representative of the International Association of Machinists, testified credibly as follows:

Trial Examiner EADIE. Now, at that time, was there a campaign in progress for union representation in the plant?

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The WITNESS. Not that I know of. I don't know what I was called for over there at all. This man that wanted to see me didn't state the reason why. That was my first trip to the plant.

Trial Examiner EADIE. And I take it that your union was the bargaining agent in the plant at that particular time?

The WITNESS. That's right sir.

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Q. (By Mr. CARLSON.) Just one other question. Did the campaign at the plant begin after your meeting with Boerschel?

A. Well, yes sir. The campaign began there, but not through my efforts. CIO started the campaign in the plant.

At the time of his discharge Boerschel testified that Humphrey said, "Well, Mr. Morrow is through with you." I asked what it was all about. He said, "Well, you left the gate open and a union man was out there." I told him O. K. and tried to talk to him. He said "no use talking to me, nothing I can do about it." I gave him the key and he handed me an envelope.

Assuming the facts to be as presented by the General Counsel at the close of his case there was then open for the Trial Examiner's consideration a choice of two inferences to be drawn from the facts as outlined above. Either inference, to wit: (a) That those alleged facts supported an inference that Boerschel was discharged by the Respondent for alleged concerted union activity in violation of Section 8 (a) (1) and (3) of the Act; and (b) that such facts justified an inference that Boerschel was discharged because he had admittedly violated his instructions and allowed the gate to remain open at unauthorized times for which he had been discharged by the Respondent and not for any concerted or union activity on his part. If there were no additional facts to be found based on substantial evidence it is debatable whether an inference could be justifiably found from the facts in support of the contention that his discharge was occasioned or brought about for the reason that he engaged in concerted or union activity; or that the Respondent through its officers believed that he had done so.

The decision of the question as to what inference is to be accepted becomes moot for the reason that the Respondent has placed in the record credible substantial evidence which preponderates in favor of the Respondent's contention that Boerschel was not discharged by it for presumed or active participation on his part in engaging in concerted or union activities.

*B. Additional credible facts that must be considered before the determination of the question of inference can be drawn*

Between 7 and 7:30 p. m. on the night in question a fire had broken out in the plant. Jule Sams, maintenance foreman for the Respondent whose duty it was to take charge of fire fighting at the plant, upon receiving a phone message that a fire had broken out hurriedly drove his automobile to the plant's gate. It was locked. He could see Boerschel sitting at his desk in a slumped position. He honked his horn several times. It had no effect on Boerschel. He thereupon unlocked the gate with a key which he always carried. He went inside the gatehouse and found Boerschel asleep. He had to slap him several times to awaken him. In his opinion Boerschel was intoxicated as his breath smelled of liquor. Boerschel denied that charge but admitted that he had a glass of beer at luncheon at 3:30 p. m. that afternoon. Boerschel wanted to know what Sams was doing there at that time of night. He told Boerschel that there was a fire in the plant and immediately drove with all haste to the fire where he proceeded to take charge of the fire-fighting crew. When the fire was out, Sams reported Boerschel's behavior to Hester Humphrey, the plant superintendent. He discharged Boerschel the next morning and when Boerschel reported for work the

next afternoon he notified him to that effect. Humphrey testified credibly as to the report he had received from Sams and the conversation he had with Boerschel when he notified him of his discharge as follows:

Q. (By Mr. ERKER:) State what that report was?

A. After the fire was all put out, wasn't cleaned up, the fire was all out, sisal still on the floor, Mr. Sams told me that he couldn't get in the gate due to the fact that the watchman was asleep. He in return had to take his key and open the gate and come on in, and I was already there before that time.

Q. How did you get to the fire, Mr. Humphrey?

A. Right out my back door of the plant; I live on the premises.

Q. So you did not have occasion to go to the front gate?

A. No, sir.

Q. After you got this report from Sams, was Mr. Boerschel discharged the following morning?

A. Yes.

Q. State to the Examiner what occurred?

A. Well, Mr. Sams made his report to me, and Uncle Al is a likeable kind of a guy and I had him around for a long time. I liked him. In case of a fire, that was different. I just had to discharge him. That was made the following morning early, and he got his discharge when he came in to work.

Trial Examiner EADIE. You actually attend the discharge?

The WITNESS: I did.

Q. (By Mr. ERKER:) Now, what did you say to him at the time?

A. I said, "Uncle Al, that report was made to me, you were asleep." I said, "I just can't put up with that." I couldn't. "That is the best I can do, there is nothing I can do about it. I'll have to discharge you."

With the additional facts as found above, the inference that Boerschel was discharged by the Respondent for purported or actual concerted or union activity is rejected and the version of the facts as testified to by the Respondent's witnesses is accepted.

#### Conclusions Reached on the Facts

The General Counsel failed to establish by a fair preponderance of the evidence that Boerschel was discharged by the Respondent for purported or actual concerted union activities on his part. It is further found that Boerschel's discharge was occasioned or brought about by his own actions in violation of his given instructions in allowing the gate of the plant to remain open and unlocked during proscribed hours and being asleep at his post as watchman or guard during his tour of duty. The Respondent was justified in the discharge of Boerschel. Its acts in so doing were not in violation of Section 8 (a) (1) and (3) and Section 7 of the Act.

The Trial Examiner will recommend that the complaint herein be dismissed against the Respondent in its entirety.

#### CONCLUSIONS OF LAW

1. F. Burkart Manufacturing Company is a corporation organized and existing under and by virtue of the laws of the State of Missouri.

2. International Association of Machinists, A. F. L., Upholsterers' International Union of North America and its Local 702, AFL, and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, are labor organizations 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 (a) (1) and (3) and Section 2 (6) and (7) of the Act.

#### Recommendation

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the Trial Examiner recommends that the complaint against F. Burkart Manufacturing Company be dismissed in its entirety.

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UNITED STATES RUBBER COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 113, PETITIONER. *Cases Nos. 13-RC-1921, 13-RC-1922, and 13-RC-1961. September 28, 1951*

#### Decision, Order, and Direction of Election

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Irving M. Friedman, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.<sup>1</sup>

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Reynolds and Murdock].

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.
2. The labor organizations involved claim to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act, in Case No. 13-RC-1921. No question affecting commerce exists in Case No. 13-RC-1922.
4. In Case No. 13-RC-1921, Petitioner seeks to sever from a production and maintenance unit at the Employer's Fort Wayne, Indiana,

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<sup>1</sup> At the outset of the hearing, Petitioner, IAM, moved to withdraw its petition in Case No. 13-RC-1961, which sought a unit of precision metal inspectors, gage checkers and lead man, and in the absence of any objections, the hearing officer granted the motion. Section 102.52 of the Board's Rules and Regulations, as amended March 1, 1951, vests in the Regional Director or in the Board, and not in the hearing officer, the power to permit the withdrawal of a petition. None of the parties herein, however, objected to the request by the IAM to withdraw its petition and no evidence was taken in regard to that petition. We therefore find that the withdrawal of the petition in Case No. 13-RC-1961 will not prejudice any of the parties herein. Accordingly, the motion of the IAM to withdraw its petition in Case No. 13-RC-1961 is hereby granted, and Case No. 13-RC-1961 is hereby ordered severed from Cases Nos. 13-RC-1921 and 13-RC-1922 in which the IAM also appears as Petitioner. *W. J. Smith Wood Preserving Company*, 80 NLRB 824.