

atmosphere tending to impair the untrammelled and uninhibited choice by employees under the statutory conditions required by the Act.

It is the function of the Board to provide a forum under which an election can be conducted under conditions as ideal as possible. It is concluded that the disparate application of the rule under all of the circumstances involved herein rendered it impossible for the Board to fulfill its functions in accordance with the strict standards designed to assure that the participating employees have the opportunity to register their free choice for or against a bargaining representative.

Accordingly, it is recommended that the election conducted on September 27, 1950, be set aside and a new election conducted.

FOREST LAWN MEMORIAL-PARK ASSOCIATION, INC. *and* MORTUARY EMPLOYEES UNION, LOCAL NO. 151, INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, A. F. OF L. *Case No. 21-CA-1077. December 10, 1951*

Decision and Order

On August 15, 1951, Trial Examiner Bruce Hunt 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.

The request of the Respondent for oral argument is hereby denied, as the record, including the brief and exceptions, adequately presents the issues and positions of the parties.

The Board¹ 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 brief and exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications:

Like the Trial Examiner, we find that the Employer is engaged in commerce and that it will effectuate the policies of the Act to assert jurisdiction in this case.

In computing the dollar volume of the Employer's out-of-State shipments during the 12-month period ending April 30, 1951, the Trial Examiner properly included the value of embalming and other services rendered in each case within the State prior to shipment,

¹ Pursuant to Section 3 (d) 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 Styles].

as well as the value of the caskets and shipping cases in which the remains were transported.² Even if we were to consider only the value of the caskets and shipping cases, as the Respondent contends we should, the total value of all³ out-of-State shipments during the period involved, added to the value of the Respondent's direct and indirect inflow, would, under the rule of the *Rutledge Paper Products* case,⁴ satisfy the Board's minimum requirements for asserting jurisdiction.⁵

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 Respondent, Forest Lawn Memorial-Park Association, Inc., Glendale, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Mortuary Employees Union, Local No. 151, International Brotherhood of Firemen and Oilers, A. F. of L., or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Inquiring of employees concerning the identity of employees who contemplate organizational activity or who attend union meetings; inquiring of them concerning their expectations of gain from organizational activity; characterizing as disloyal to the Respondent their attendance at union meetings and their refusal to identify proponents of organizational activity; telling employees that a choice must be exercised between loyalty to the Respondent and to the Union; and seeking to induce any employee to disrupt union activities.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Mortuary Employees Union,

² *Riverside Memorial Chapel, Inc.*, 92 NLRB 1594

³ There is no legal basis for the Respondent's contention that we should exclude from our determination of the extent of the Respondent's operations in commerce shipments made out-of-State at the request of local, rather than out-of-State, clients. Such shipments constitute interstate commerce. See *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282. While we stated in the *Riverside Memorial* case, *supra*, that the out-of-State shipments in that case were made at the request of out-of-State clients, we did not intend to imply that we would have reached a different result if the shipments there made had been ordered by local clients.

⁴ 91 NLRB 625.

⁵ The record shows, and we find, that during the 12-month period under consideration the Respondent received from points out of the State goods valued at \$40,452, and purchased within the State goods valued at \$216,684, which originated out of the State. While it appears, as the Respondent contends, that more than half of the latter figure consisted of purchases of capital equipment, and that none of the articles purchased were further processed by the Respondent, these circumstances are not significant in determining whether the Board's current minimum jurisdictional requirements have been met.

Local No. 151, International Brotherhood of Firemen and Oilers, A. F. of L., or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act.

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

(a) Offer to Ralph M. Bailey, Donald J. Isham, Harlan E. Phillippe, and Darrell E. Ward immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(b) Make whole Ralph M. Bailey, Donald J. Isham, Harlan E. Phillippe, and Darrell E. Ward in the manner set forth in the section of the Intermediate Report entitled "The Remedy," for any loss of pay and vacation allowance each may have suffered as a result of the discrimination against them.

(c) Upon request, make available to the Board or its agents for examination and copying all payroll and other records necessary to determine the amount of back pay due under the terms of this Order.

(d) Post in conspicuous places in its offices and place of business, including all places where notices to employees are customarily posted, copies of the notice attached hereto as an Appendix to the Intermediate Report.⁶ Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) File with said Regional Director within ten (10) days from the date of this Order, a report in writing, setting forth in detail the steps which the Respondent has taken to comply herewith.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

A charge having been duly filed, a complaint and notice of hearing thereon having been issued and served by the General Counsel, and an answer having

⁶ This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner," the words "A Decision and Order." If this Order is enforced by a decree of a United States court of appeals, the notice shall be further amended by inserting the words "A Decree of a United States Court of Appeals Enforcing" before the words "A Decision and Order."

been filed by the above-named Association, a hearing involving allegations of unfair labor practices in violation of the National Labor Relations Act, 61 Stat. 136, herein called the Act, by said Association, herein called the Respondent, was held upon due notice at Los Angeles, California, on July 9 and 10, 1951, before the undersigned Trial Examiner. The allegations, in substance, are that the Respondent discharged Ralph M. Bailey, Donald J. Isham, Harlan E. Phillippe, and Darrell E. Ward because of their union or concerted activities, in violation of Section 8 (a) (1) and (3) of the Act, and interrogated and made threats and coercive statements to employees concerning their union activities, in violation of Section 8 (a) (1) thereof. All parties were represented by counsel or other representative, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file briefs and proposed findings and conclusions. Briefs were received from the General Counsel and the Respondent, and have been considered. Motions by the General Counsel and the Respondent, to strike certain portions of a written "Stipulation of Facts" they had entered into concerning the Respondent's business, which were made during the course of the hearing and taken under advisement by me, are hereby denied. The Respondent's motion to dismiss the complaint upon jurisdictional grounds, also taken under advisement, is hereby denied.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, Forest Lawn Memorial-Park Association, Inc., is a non-stock, nonprofit cemetery association of lot owners in Forest Lawn Memorial-Park, a private cemetery in Glendale, California, herein called Forest Lawn. The Respondent is engaged in the operation and maintenance of Forest Lawn, and has 27 departments and approximately 500 employees. Its mortuary department, with which we are concerned here, has 58 employees. The Respondent advertises that it "offers complete undertaking service and all forms of interment" and that its mortuary "is the only undertaking establishment within cemetery grounds."

During the 12-month period ending April 30, 1951, the Respondent's sales of property, services and supplies, including graves, crypts, niches, interment charges, cremations, and mortuary services, amounted to \$4,621,803. Included within this figure were charges for 3,870 instances in which mortuary services were performed, 3,716 of which involved interments in Forest Lawn. The remaining 154 interments were as follows: 40 within the State of California elsewhere than in Forest Lawn, and 114 outside the State. Of the 114, 98 represented instances in which the Respondent's services were contracted for by local individuals, and 16 represented instances in which the services were contracted for by out-of-State individuals or mortuaries. In the 98 instances, the Respondent received a total of \$43,595 as follows: \$26,767 for embalming and other services, \$13,383 for caskets, and \$3,445 for shipping cases. In the 16 instances, a total of \$9,977 was received as follows: \$6,225 for embalming and other services, \$3,112 for caskets, and \$640 for shipping cases. The total thus received for the 114 instances is \$53,572. In approximately 85 percent of the 114 instances, the bodies were shipped out-of-State

within a week, and in all the 114 instances the Respondent made appropriate arrangements with the carriers.¹

The Board has exercised jurisdiction over a mortuary in only one instance, *Riverside Memorial Chapel, Inc.*, 92 NLRB 1594.² The jurisdictional standard of \$25,000 announced by the Board in *Stanislaus Implement and Hardware Company, Limited*, 91 NLRB 618, is applicable here. The figure of \$53,572 set forth above is substantially in excess thereof.³ The Respondent asserts, however, that it is not subject to the jurisdiction of the Board, and raises several defenses. According to the Respondent, it is engaged in an entirely local enterprise, the operation and maintenance of a private cemetery, and its mortuary and other operations are all incidental thereto. The fact, however, is that the mortuary is not operated exclusively in connection with interments in the cemetery, but competes with local mortuaries. As related, the Respondent furnishes mortuary services whether interment is to be within or outside California. While the Board appears not to have asserted jurisdiction over a cemetery, and it may be assumed *arguendo* that the Respondent's cemetery operations are outside the Board's jurisdiction, it does not follow that the Respondent is wholly exempt from the provisions of the Act. Cf. *Di Giorgio Fruit Corporation*, 80 NLRB 853, where the employer was engaged in agricultural and related operations. Contrary to the Respondent's contention, I also find that jurisdiction is not to be declined because the proportion of the Respondent's income which is derived from services and supplies furnished in connection with out-of-State shipments is relatively small. *J. L. Brandeis & Sons v. N. L. R. B.*, 142 F. 2d 977 (C. A. 8), cert. den. 323 U. S. 751, 65 S. Ct. 85. Next, the Respondent emphasizes that the Board, in the *Riverside Memorial* case, spoke of shipments at the request of out-of-State clients, and points out that in 98 of its 114 out-of-State shipments the contractual arrangements were made with local individuals. I do not believe, however, that the location of the client or the contractual arrangements is controlling. Cf. the *Brandeis* case, *supra*. Finally, the Respondent contends that only the value of the shipping cases, in which the corpses and caskets were enclosed for shipment, should be considered in determining jurisdiction. This contention also must be rejected. In the *Riverside Memorial* case the Board gave consideration to the entire value of the employer's services, specifically including caskets.

I find that the Respondent is engaged in commerce and that, under applicable decisions of the Board, jurisdiction should be asserted herein.

II. THE LABOR ORGANIZATION INVOLVED

Mortuary Employees Union, Local No. 151, International Brotherhood of Firemen and Oilers, A. F. of L., herein called the Union, is a labor organization admitting to membership employees of the Respondent.

¹ In some instances, the corpses were called for at Forest Lawn by the carriers. In other instances, the Respondent made delivery to the carriers. The transportation charges in the 114 instances totaled not less than \$5,700. In most of the instances, the Respondent's clients gave to it checks payable to the carriers; in a few instances the Respondent advanced the transportation charges and later billed its clients. Contrary to the contention of the General Counsel, I believe that the \$5,700 figure should not be added to the figure of \$53,572 in determining jurisdiction. The former figure represents expenditures for the services of persons other than the Respondent.

² In the *Riverside Memorial* case, jurisdiction was based upon the facts that the employer (1) was engaged in commerce and (2) was also an integral part of a multistate enterprise.

³ Since, in my judgment, jurisdiction is to be exercised on the basis of this figure, I find it unnecessary to discuss the General Counsel's contention concerning application of the jurisdictional theory established by the Board in *The Rutledge Paper Products, Inc.*, 91 NLRB 625.

III. THE UNFAIR LABOR PRACTICES

A. *Preliminary*

The Respondent did not participate in the hearing during the presentation of evidence by the General Counsel concerning the unfair labor practices, nor did the Respondent call witnesses in its own behalf. Consequently the findings below are based upon the testimony of the discharged employees, which I believe is reliable and probative.

B. *Chronology of events*

About mid-March 1951, organizational activity occurred among the Respondent's embalmers, who numbered about 15, as well as among embalmers of other local mortuaries. A few days later, Darrell E. Ward, an embalmer, talked with Harry T. Rowe, director of the mortuary department. Ward told Rowe that "the embalmers as a whole were very disgruntled" and that the matter "was getting very serious." Rowe asked Ward to give him the names of any embalmers who were thinking of organizing, but Ward refused.

On March 23 a union meeting was held. Among the Respondent's embalmers in attendance were Ward, Ralph M. Bailey, and Donald J. Isham, who then or later became members of the Union. Harlan E. Phillippe, another of the Respondent's embalmers, arrived at the meeting as it ended and at that time applied for membership.

On March 26, Attorney Blalock questioned Bailey in the presence of Rowe. Blalock inquired what the employees expected to gain by the organizational activity and whether working conditions at the Respondent's mortuary compared favorably with conditions at its competitors. Blalock asked Bailey to disclose the names of employees in attendance at the union meeting, and Bailey avoided the inquiry. Blalock then asked the number of employees who had attended, and Bailey said he believed the number was five. Bailey inquired as to his standing with the Respondent, and Blalock said that he could not answer the question. Later on that day, the Respondent called a meeting of its embalmers. Present on behalf of the Respondent were Rowe, Blalock, one Christenson, personnel director, and one Llewellyn, executive vice president. Rowe opened the meeting by saying that "a very grave injustice and disloyal act had been done," that he understood there had been a union meeting, and that he wished to know who had attended. There was no response. Blalock then inquired, ". . . Are you fellows ashamed of what you did? Why don't you want to tell us?" He also asked what the employees expected to gain, and said that they should have been satisfied with their working conditions. Bailey, Isham, Ward, and Phillippe all acknowledged having been present at the union meeting. One other employee of the Respondent, Eugene Ridge, had attended the meeting, but did not acknowledge having done so. He does not appear to have been discharged. Blalock, Rowe, and Llewellyn at different times during the meeting said that the employees should choose between loyalty to the Respondent and to the Union.

On the next day, March 27, Ward inquired of Rowe whether the employees "were to be dismissed or what was the outcome of the whole situation." Rowe answered that he did not know, adding that Ward "had done him a very disloyal act by not beforehand telling him who the troublemakers were down around all the other funeral homes." On the same day, Phillippe inquired of Rowe what action would be taken toward the employees who had engaged in organizational activity, and Rowe answered that he could not say "because some of those same men have been in this same experience before." Late that afternoon, Ward, Bailey, Isham, and Phillippe were discharged by Rowe, who gave to each of

them a brief letter saying that their services were being terminated as of that day and that they were being given "two weeks' pay in advance." The letter contained no explanation for the discharges, and Rowe refused to elaborate, saying that he "was very sorry that this all happened" and that he had been instructed by his superiors "not to say anything."

A few days later, Bailey and Isham chanced to meet Christenson in a cafe. Christenson said that he liked all of the discharged employees and that he regretted "what he had to do." Bailey called attention to the fact that a union meeting had been scheduled for March 28, the day after the discharges, and inquired of Christenson whether the motive for the discharges had been "the psychological effect" on the remaining embalmers so that they would refrain from attending that meeting. Christenson answered in the affirmative. He said also that the work of the discharged employees had been good and that they "would be missed."

About a month later, Bailey called upon Blalock, seeking reinstatement. There was some discussion of union activity, in which Blalock inquired whether Bailey still retained his membership. Bailey answered in the affirmative, and Blalock made the same inquiry concerning Isham. Bailey answered that Isham's attitude toward the Union "was about the same as" his own. Blalock asked whether Bailey thought that by playing along with the Union he could "break it up," and Bailey answered in the negative. Bailey said that all he wished was reinstatement and "to get withdrawn from the blacklist." Blalock said that he did not know what could be done. Later he telephoned Bailey and said that he could not do anything.

C. Conclusions

The above facts, based upon uncontradicted and reliable testimony offered by the General Counsel, leave no doubt that the employees were discharged, and that Bailey was refused reinstatement, because of their union activities. No extensive discussion is necessary. It suffices to say that no other basis is offered for the discharges, nor can one be inferred from the record. Accordingly, I find that by the discharges, and the refusal to reinstate Bailey, the Respondent violated Section 8 (a) (3) and (1) of the Act. I find also that the Respondent, by inquiring of employees concerning the identity of employees who contemplated organizational activity and who had attended union meetings, by inquiring of them concerning their expectations of gain from organizational activity, by characterizing as disloyalty to the Respondent the attendance at a union meeting and the refusal to identify proponents of organizational activity, by telling the employees that a choice must be exercised between loyalty to the Respondent and to the Union, and by seeking to induce Bailey to play along with the Union in an effort to disrupt it, the Respondent violated Section 8 (a) (1).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

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

I have found that the Respondent discharged Ralph M. Bailey, Donald J. Isham, Harlan E. Phillippe, and Darrell E. Ward on March 27, 1951, and thereafter rejected Bailey's request for reinstatement, because of their union activities. I shall recommend, therefore, that the Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions (*The Chase National Bank of the City of New York, San Juan, Puerto Rico Branch*, 65 NLRB 827), without prejudice to their seniority or other rights or privileges, and that it make each of them whole for any loss of pay and vacation allowance⁴ he has suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages, including vacation pay, from the date of the discrimination to the date of a proper offer of reinstatement, less his net earnings (*Crossett Lumber Company*, 8 NLRB 440, 497-8) during said period, the payment to be computed upon a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289. I shall also recommend, in accordance with the *Woolworth* decision, that the Respondent, upon request, make available to the Board and its agents all pertinent records.

In view of the nature of the unfair labor practices committed, particularly the unlawful discharges, I shall also recommend, in order to make effective the interdependent guarantees of Section 7 of the Act, that the Respondent cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.

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

CONCLUSIONS OF LAW

1. The Union 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 Ralph M. Bailey, Donald J. Isham, Harlan E. Phillippe, and Darrell E. Ward, and each of them, and 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 (a) (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 (a) (1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

[Recommended Order omitted from publication in this volume.]

Appendix

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

⁴ The General Counsel correctly contends that the vacation rights of the employees should not be prejudiced by reason of the discharges. *Eureka Vacuum Cleaner Company*, 69 NLRB 878.

WE WILL NOT discourage membership in MORTUARY EMPLOYEES UNION, LOCAL No. 151, INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, A. F. OF L., or in any other labor organization of our employees, by discharging or refusing to reinstate any of our employees or discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment.

WE WILL NOT inquire of employees concerning the identity of employees who contemplate organizational activity or who attend union meetings; or inquire of them concerning their expectations of gain from organizational activity, or characterize as disloyalty to us their attendance at union meetings and their refusal to identify proponents of organizational activity, or tell employees that a choice must be exercised between loyalty to us and to the Union, or seek to induce any employee to disrupt union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist MORTUARY EMPLOYEES UNION, LOCAL No. 151, INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, A. F. OF L., or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act.

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 and vacation allowance suffered as a result of the discrimination.

Ralph M. Bailey
Donald J. Isham

Harlan E. Phillippe
Darrell E. Ward

All our employees are free to become or remain, or to refrain from becoming or remaining, members in good standing of the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

FOREST LAWN MEMORIAL-PARK
ASSOCIATION, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

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

PIERCE BROTHERS and MORTUARY EMPLOYEES UNION, LOCAL No. 151,
INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, A. F. OF L.
Case No. 21-CA-1078. December 10, 1951

Decision and Order

On July 24, 1951, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled proceeding, finding that the Re-97 NLRB No. 63.