

conduct an election in November 1951 among employees, most of whom were not employed by the Employer at the time of the foregoing direction of election. However, if we were to adopt this reasoning, we would be precluded from conducting an election in any seasonal industry where, as is often the case, there is a high rate of turnover from one season to another. The Board has no requirement that there be substantial identity in the employee complement between the date of a direction of election and the date of the election. Accordingly, we find no merit in this objection, and it is hereby overruled.

As we have overruled the Employer's objections, we shall deny its request that the election be set aside.

Because, as the tally shows, a majority of ballots was cast for Local Union No. 24792, we shall certify it as the exclusive bargaining representative of the employees in the appropriate unit.

Certification of Representatives

IT IS HEREBY CERTIFIED that AFL Beet Sugar Refinery Employees Local Union No. 24792 has been designated and selected by a majority of the employees of Franklin County Sugar Company, Preston, Idaho, in the unit of campaign employees heretofore found by the Board to be appropriate, as their representative for the purpose of collective bargaining and that, pursuant to Section 9 (a) of the Act, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining, with respect to rates of pay, wages, hours of employment, and other conditions of employment.

ANTHONY C. MARKITELL AND JOHN H. DENT, PARTNERS, D/B/A TRAFFORD COACH LINES, AND TRAFFORD COACH LINES *and* AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1214. *Case No. 6-CA-281. January 3, 1952*

Decision and Order

On July 25, 1951, Trial Examiner W. Gerard Ryan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondents had not engaged in certain other unfair labor practices, and recommended that those allegations of the complaint be

dismissed. Thereafter, the Respondents filed exceptions to the Intermediate Report.

The Board¹ has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The Trial Examiner's rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as modified below.²

1. We agree with the Trial Examiner's finding that the Respondents, through Anthony Markitell, discharged Cole, Hopkins, and Taylor because of their activities in behalf of the Union as members of its grievance committee. This finding is directly supported by the credited testimony of Business Agent Welsh, that on September 27, 1949, Markitell told him that the men were discharged because he, Markitell, would no longer tolerate their union activities. The Trial Examiner also found, as the General Counsel contended, that Markitell discharged these employees because 3 weeks earlier, on September 5, they had engaged in a strike against the Respondents in violation of an existing collective bargaining agreement. Admittedly, however, Markitell had condoned the earlier strike activity, and had reinstated all the employees who participated in it. Moreover, the only indication in the record of continued resentment against these employees because of the strike is found in an affidavit of Markitell which he effectively repudiated as a witness at the hearing. In these circumstances, we do not consider the evidence sufficient to warrant a specific finding that their earlier strike action was included among the reasons for their discharge. We therefore reject the Trial Examiner's factual finding in this respect. In any event, it is clear on the record as a whole, and, like the Trial Examiner, we conclude, that the Respondents discharged Cole, Hopkins, and Taylor in order to put an end to their concerted activities at the Respondents' business, and that such discharges violated Section 8 (a) (1) and (3) of the Act.

2. The Trial Examiner also found that the Respondents discharged Di Rito because of his union activities generally and because of his participation in the September 5 strike, and that such illegal dismissal occurred on September 27, 1949. We cannot agree that the record supports the complaint allegation of discriminatory discharge of this employee.

¹ 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 Murdock].

² The Trial Examiner also found that the evidence did not support the allegation of discriminatory discharge as to William Miller. As no exceptions have been filed to this finding, we adopt it.

As set forth in the Intermediate Report, Di Rito entered a hospital on September 8. The record contains no evidence either that he attempted to return to work before the middle of October, or that he participated in any union activities during his illness and convalescence. Upon his return in October, he was refused employment, the Respondents stating that he had been replaced. Before his illness, Di Rito had been a member of the union-shop committee. In finding that he was discharged on September 27, the Trial Examiner relies on Markitell's statement on that day to Welsh that the "committee" was discharged. We cannot infer, however, that Markitell thereby intended to discharge Di Rito also, because, although he paid off committee members Cole, Taylor, and Hopkins, he did not discharge Carl Miller, who was then also an active member of the union committee. On this state of the record, if Di Rito was discharged at all—and did not, as the Respondents contend, forfeit his job rights by his extended absence from work—it must be found that he was dismissed in October, after his illness.

As Di Rito did not leave the hospital until September 28, after Cole, Taylor, and Hopkins were discharged, it cannot be said that their activities, in which he did not participate, were the motivating cause for the termination of his employment. There remains, then, for consideration, Di Rito's participation in the unprotected strike of September 5. Again, the Trial Examiner's finding that the Respondents discharged Di Rito, at least in part, for this reason, rests upon insubstantial evidence. Indeed, the only direct evidence in this respect is found in Markitell's affidavit, given to a Board investigator before the hearing and received in evidence. As stated above, Markitell in effect disavowed this affidavit in all material respects from the witness stand. Like the Trial Examiner, we place great weight on this statement as discrediting Markitell's testimony, particularly his asserted reason for discharging the other three committee members. We do not, however, place credence in it, and will not use it as probative evidence to support an affirmative finding as to its contents.³ Although the matter is not entirely free from doubt, we are not satisfied, in these circumstances, that Di Rito was discriminatorily discharged within the meaning of Section 8 (a) (3) of the Act. We have also considered, and deem significant, the fact that after the first 30 days of his absence, Di Rito failed to comply with the procedural requirements, set up in the existing collective bargaining agreement, for assuring retention of his employment rights. Accordingly, we shall dismiss the complaint as to Di Rito.

³ *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 87 NLRB 502, 522; *Fallsbury Mills, Inc.*, 74 NLRB 1113, 1115.

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 Respondents Anthony C. Markitell and John H. Dent, partners, d/b/a Trafford Coach Lines, their agents, successors, and assigns, and the Respondent Trafford Coach Lines, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1214, or in any other labor organization of their employees, by discriminatorily discharging and refusing to reinstate any of their employees or in any manner discriminating against them in regard to their hire and tenure of employment, or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes 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 rights may be affected by an agreement requiring membership in any labor organization, as authorized in Section 8 (a) (3) of the Act, as guaranteed by Section 7 thereof.

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

(a) Offer to William Cole, George Hopkins, and Harry Taylor immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make each of them whole for any loss of pay he may have suffered by reason of the Respondents' discrimination against him, by payment to each of them of a sum of money covering his loss of pay, such loss of pay to be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondents' discriminatory action to the date of the offer of reinstatement. The quarterly periods, hereinafter called "quarters," shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which he normally would have earned for each quarter or portion thereof, his net earnings, if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.

(c) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the right of reinstatement under the terms of this Order.

(d) Post at their plant in Greensburg, Pennsylvania, copies of the notice attached hereto and marked "Appendix A."⁴ Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by the Respondents' representative, be posted by the Respondents immediately upon receipt thereof and maintained by them 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 Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Sixth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that Respondents discriminated in regard to the hire and tenure of employment of William F. Miller and Bennie Di Rito, in violation of Section 8 (a) (3) of the Act.

Appendix A

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 discourage membership in AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1214, or any other labor organization of our employees, by discharging or refusing to reinstate any of our employees, or by discriminating in any other manner with regard to their hire and tenure of employment, or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted

⁴ In the event this Order is enforced by a decree of a United States Court of Appeals there shall be inserted in the notice, before the words "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

activities for the purposes 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 a condition of employment, as authorized in Section 8 (a) (3) of the Act, as guaranteed by Section 7 thereof.

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:

William Cole George Hopkins Harry Taylor

All our employees are free to become or remain members of the afore-mentioned union, or any other labor organization, or to refrain from such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employees because of membership in or activity on behalf of any such labor organization.

(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.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

Upon amended charges filed by Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1214, herein called the Union, the General Counsel of the National Labor Relations Board, called herein respectively the General Counsel and the Board, through the Regional Director for the Sixth Region (Pittsburgh, Pennsylvania), issued a complaint dated April 19, 1951, against Anthony C. Markitell and John H. Dent, Partners, d/b/a Trafford Coach Lines, herein called the Respondent Markitell, and Trafford Coach Lines, herein called the Respondent Trafford, alleging that the Respondents had engaged in and were 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 Labor Management Relations Act, 1947, herein referred to as the Act. Copies of the charges, the complaint, and notice of hearing were duly served upon the Respondents and the Union.

With respect to the unfair labor practices, the complaint alleges in substance: (1) That on or about September 27, 1949, in violation of Section 8 (a) (1) and

(3) of the Act, the Respondent Markitell discriminatorily discharged and thereafter the Respondent Markitell and the Respondent Trafford refused reinstatement to William Cole, Bennie Di Rito, George Hopkins, William Miller, and Harry Taylor because of their membership in and activities on behalf of the Union, and because they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection.

In its answer filed on May 16, 1951, the Respondents admitted certain allegations of the complaint but denied the commission of any unfair labor practices.

Pursuant to notice a hearing was held in Greensburg, Pennsylvania, from May 17 to May 18, 1951, inclusive, before W. Gerard W. Ryan, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. All the parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues.

At the beginning of the hearing, counsel for the Respondents moved for continuance of the hearing on the ground that owing to his absence from the city, he had not had sufficient time to prepare his defense. The motion was denied. At the conclusion of the General Counsel's case-in-chief, the motion was renewed and again denied. After calling eight witnesses in its defense, the motion for continuance was renewed for the purpose of obtaining the testimony of three additional witnesses whose whereabouts were then unknown. I offered to hold the hearing open for the remainder of Friday afternoon, Saturday, May 19, and Monday, May 21, if the Respondent could produce its witnesses during that time. The offer was not acted upon and I refused to grant further delay. At the same time, I advised counsel of the Board's Rules and Regulations governing the deposition of witnesses. No application to take depositions has been made to me either during or subsequent to the hearing. Counsel for the Respondents also moved, at the opening of the hearing, for dismissal of the complaint on the ground that a prior charge, which had been filed while the Union had not complied with Section 9 (f), (g), and (h) of the Act, had been dismissed by the Regional Director on December 20, 1949, and that the matter was *res judicata* since no request for review of that action had thereafter been made. Since the complaint is based upon charges filed after the Union complied with the Act, and within the statutory period of 6 months of the acts complained of, I denied that motion. At the conclusion of the testimony, the General Counsel's motion to conform the pleadings to the proof in minor matters was granted in the absence of objection. The parties were afforded an opportunity for oral argument and to file briefs, proposed findings of fact, and conclusions of law. No briefs, proposed findings, or conclusions have been filed.

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

FINDINGS OF FACT¹

I. THE BUSINESS OF THE RESPONDENTS

Prior to on or about March 1, 1950, the Respondent Markitell was a partnership having its principal office and place of business in the city of Ardara, Commonwealth of Pennsylvania. Since on or about March 1, 1950, the Respondent Trafford has been and still is a corporation organized and existing

¹ In making the findings herein I have considered and weighed the entire evidence. It would needlessly burden this Report to set up all the testimony on disputed points. Such testimony or other evidence as is in conflict with the findings herein is not credited.

by virtue of the laws of the Commonwealth of Pennsylvania with its principal office and place of business located in the city of Ardara. On or about March 1, 1950, the Respondent Trafford acquired the assets, assumed the liabilities, and succeeded to the business of the Respondent Markitell and since then has operated the business formerly operated by the Respondent Markitell without any substantial changes.

During the 12-month period ending December 31, 1950, which period is representative of all time material hereto, the Respondents transported passengers and busses under authority of the Pennsylvania Public Utilities Commission between the towns of Trafford, Pitcairn, Wilmerding, Turtle Creek, East Pittsburgh, and Forrest Hills, Commonwealth of Pennsylvania; and between the towns of Trafford, Harrison City, Jeannette, and Claridge, Commonwealth of Pennsylvania; and between the towns of Trafford, Larimer, and Irwin, Commonwealth of Pennsylvania.

During the same period, the Respondents purchased in excess of \$60,000, worth of gasoline, oil, and parts within the Commonwealth of Pennsylvania. During the same period, the Respondents purchased \$45,000 worth of busses from Reo Motor Bus Company, Pittsburgh, Pennsylvania, which were shipped by road to Trafford and had been manufactured outside the Commonwealth of Pennsylvania. During the same period, the Respondents received in excess of \$200,000 for transporting passengers on the above lines, in excess of 65 percent of which was derived from transporting workers to and from businesses engaged in interstate commerce. The Respondents stipulated and I find that they are engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1214, is a labor organization within the meaning of Section 2 (5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Introduction

On October 12, 1948, the Union and the Respondents entered into a collective bargaining agreement covering wages, hours, and other terms and conditions of employment until November 1, 1949, and providing for automatic renewal unless changed by the parties after specified notice. The agreement also provided that there would be no strike or lockout during its term, and, among other items, that no one except operators were to operate busses on passenger service except in emergency. With the exception of the situation attending the alleged discriminatory discharges herein the relationship between the Respondents and the Union has been at all times harmonious. On several occasions prior to September 5, 1949, conferences had been had between the company and the Union concerning operation of the busses by drivers other than bus operators. About 1 month prior to September 5, 1949, the members of the Union at a meeting voted to strike the next time anyone except an operator drove a bus. On September 5 (Labor Day), contrary to the terms of the contract, and without notice to the company, the bus operators went on strike to protest the operation of a bus by a mechanic. The union committeemen, William Cole, Harry Taylor, Bennie Di Rito, and George Hopkins who were employed as bus operators, took an active part in directing and carrying out the strike. On September 6, the strike was settled, the company agreed that

no action would be taken against anyone for participation in the strike, all employees were returned to work, and the committeemen were warned by union officials that there were to be no more strikes.

On September 26, 1949, the Respondent Markitell discharged William Miller for not performing his job satisfactorily, and the General Counsel makes no claim that such discharge constituted an unfair labor practice.²

B. The discriminatory discharges of Wilham Cole, Harry Taylor, Bennie Di Rito, and George Hopkins

On the morning of September 27, 1949, the day following the discharge of William Miller as stated above, the union committee consisting of employees Cole, Taylor, Hopkins, and Carl Miller (the father of William Miller) conferred with Manager Pelini in an effort to have William Miller reinstated.³ When Pelini persisted in refusing to reinstate Miller, the committee notified Joseph Welsh, the business agent for the Union, who arrived at the Respondent Markitell's office within an hour and conferred alone with Anthony Markitell, partner and supervisor.⁴ During the course of the conference, Anthony Markitell not only refused to reinstate Miller but announced to Welsh that the committee was discharged because it gave Markitell "too many headaches" . . . that every little grievance that would come up, that the committee was right on him right away and that he was not going to have any more of it" Failing to have Anthony Markitell relent, Welsh then left, announced to the committee who was waiting outside that not only had he been unsuccessful in having Miller reinstated but that Cole, Taylor, and Hopkins now had been discharged.⁵ Welsh then communicated with James McGinty, union international president, and later that same evening, about 8 o'clock, Welsh and McGinty met with Anthony Markitell at a nearby hotel in an effort to have all the discharges, including Miller's, recalled. The conference lasted approximately 2 hours and then terminated without success. Welsh informed Cole, Taylor, Hopkins, and Miller, on his way out of the hotel, that Anthony Markitell refused to recall any of the discharges.

The Respondents sought to establish the defenses that Anthony Markitell did not discharge Cole, Taylor, and Hopkins until 11 p. m. on the evening of September 27, following the hotel conference, when they threatened to call a strike unless Miller was reinstated; and that Di Rito had not been discharged but had been replaced by another operator for the asserted reason that he had not given notice that he was going to be absent and the company therefore assumed that he had quit. The testimony on direct examination of Anthony Markitell in support of both defenses was weakened on cross-examination when his signed and sworn statement, dated September 26, 1950, was received in evidence. While on direct examination he had testified that Miller's discharge was the sole topic of discussion at the hotel conference with Welsh and McGinty on September 27 and that Cole, Taylor, and Hopkins were not discharged until 11 p. m. of the same evening, his prior, sworn statement admitted

² Wilham Miller worked in the garage washing and greasing the busses and doing other odd jobs.

³ Di Rito, although steward for the Union and also a committeeman, was not present, because, as shown *infra*, he was in the hospital from September 6—September 28.

⁴ Anthony Markitell became president of the Respondent Trafford when it succeeded to the partnership business in March 1950. He will hereinafter be referred to as Anthony Markitell to avoid any confusion with the designation Respondent Markitell which refers to the partnership.

⁵ Carl Miller, committeeman, was not included in the discharges.

that the committeemen were discharged prior to his conference with Welsh and McGinty, and furthermore that Cole, Taylor, Di Rito, and Hopkins had been discharged because of their participation in the Labor Day strike. Although at the hearing Anthony Markitell denied the truth of some of the paragraphs contained in his prior statement, he did admit the following to be true:

The next day, I met with Welsh and McGinnity (sic) and when I told them that the Labor Day strike was costing the company \$100.00 a day in lost revenues and that I had been threatened with another strike because of William Miller's discharge, Welsh and McGinnity agreed that I had acted within my rights in discharging the union committeemen.⁶

Both Taylor and Hopkins denied that they threatened to call a strike if Miller was not reinstated. Cole also denied such a threat and claimed that he was not present with Taylor and Hopkins at the garage at any time after the hotel conference on September 27, testifying that he did not receive his pay check until September 28.⁷

Di Rito testified that on September 6, 1949, the day he entered the hospital, he notified Milos Pekich, the company dispatcher, that he would be absent. Pekich testified that Di Rito did not notify him that he was going to be away from work, but his prior sworn statement, dated January 12, 1951, is at variance with his testimony. On the credited testimony of Cole, Taylor, and Hopkins, I find that they did not threaten to strike if Miller was not reinstated; and on the credited testimony of Di Rito, I find that he did notify the dispatcher, Pekich, on September 6, that he would be absent from work in order to have an operation. After 22 days' hospitalization, Di Rito convalesced at home and when he applied for his job about the middle of October, Anthony Markitell told him he had been replaced.

It is clear that Cole, Taylor, Di Rito, and Hopkins were discharged because of their participation in the Labor Day strike in view of another admission by Anthony Markitell in his prior sworn statement, as follows:

I have no criticism of the work performance of the *four discharges*. *They were discharged because they were responsible for the strike of the drivers on September 5 and 6, 1949* and because they threatened another strike when I refused to reinstate William Miller. [Emphasis supplied.]

Further proof that Cole, Taylor, Di Rito, and Hopkins were discharged on September 27, 1949, because of their participation in the Labor Day strike, is found in still another admission by Anthony Markitell in the same written statement, where he states:

I didn't discharge Carl Miller, union committeeman, because he was not involved in any way with the Labor Day strike.

Since neither Cole, Taylor, Di Rito, nor Hopkins had threatened to call a strike if William Miller was not reinstated, and because the Respondents had obligated

⁶ The record contains evidence of only one meeting by Markitell with Welsh and McGinty, which was the 2-hour hotel conference beginning at 8 p. m. on September 27, 1949.

⁷ On direct examination, Anthony Markitell testified that Cole was present with Taylor, Hopkins, and Miller at the garage when the threats were made, but on cross-examination, he admitted that he was not sure. Donald Sarp, testifying in support of Anthony Markitell also admitted he was not sure that Cole was present. Pursuant to stipulation of counsel at the hearing, counsel for the Respondents had forwarded to me photostatic copies, in triplicate, of the final pay checks given to Cole, Taylor, and Hopkins which I have made part of the record as Trial Examiner's Exhibits 1, 2, and 3, respectively. Cole's check is dated September 28 and the checks for Taylor and Hopkins are each dated September 27.

themselves to take back all strikers, they could not lawfully discriminate against Cole, Taylor, Di Rito, and Hopkins because of their participation in the Labor Day strike.⁸ In the *Hazel-Atlas* case,⁹ the Court stated:

In this instance the employer was under no legal compulsion to take the strikers back since they had violated the governing agreement; but when their breach was overlooked, and it was decided to reinstate them, they were entitled to even handed treatment, and the exclusion of any of them for reasons condemned by the statute would have been an unfair labor practice.

Under consideration of all the evidence, I conclude that William Cole, Harry Taylor, Bennie Di Rito, and George Hopkins were discharged on September 27, 1949, during the conference between Joseph Welsh and Anthony Markitell, and were thereafter refused reinstatement because of their participation in the strike which occurred on September 5, 1949, and because the Respondent objected to the zealous way in which they performed their duties as committeemen for the Union, and I therefore find that in violation of Section 8 (a) (3) of the Act the Respondents by discharging them and refusing them reinstatement discriminated with respect to their hire and tenure of employment, thereby discouraging membership in the Union and interfering with, restraining, the coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

C. The alleged discriminatory discharge of William Miller

William Miller was discharged for unsatisfactory work on September 26, 1949, and the General Counsel stated specifically at the hearing that no claim is made that such discharge was an unfair labor practice. The complaint alleged that he was discriminatorily discharged on or about September 27, 1949, and thereafter was refused reinstatement. To sustain the allegations of the complaint there must be sufficient proof that Miller was rehired or reinstated after his discharge on September 26 or discriminatorily refused reinstatement.

Miller testified that after the hotel conference between Welsh, McGinty, and Anthony Markitell on the evening of September 27, as set forth, *supra*, Anthony Markitell approached him and told him in the bar room of the hotel that he was reinstated. Anthony Markitell denied Miller's testimony. Harry Taylor testified that up to the time he left Cole and Miller at the hotel, Anthony Markitell had had no conversation with Miller. The nearest to corroboration of Miller's testimony was given by George Hopkins who testified only to the extent that he *thought* Miller had told him he was to be reinstated—that *maybe* Anthony Markitell would give Miller 1 or 2 weeks off, or "something like that."

In the face of all the evidence in the record, it is unlikely that following the adamant position of Anthony Markitell, maintained throughout his conference with Welsh earlier in the day, and his 2-hour conference with Welsh and McGinty at the hotel in the evening of the same day, he would within a matter of minutes following termination of the conference inform Miller that he was reinstated.¹⁰ I credit the denial by Anthony Markitell and find that he did not reinstate Miller.

I do not credit that part of the testimony of William Miller, George Hopkins, and Harry Taylor to the effect that at 11 p. m., at the garage on September 27, Anthony Markitell, in reply to Hopkins' expressed thanks for reinstating Miller,

⁸ *Columbia Pictures Corporation, et al*, 82 NLRB 568

⁹ *Hazel-Atlas Glass Company v. N. L. R. B.*, 127 F. 2d 109 (C A 4), at 118.

¹⁰ William Cole, Harry Taylor, George Hopkins, and William Miller waited in the bar-room of the hotel, during the conference in the dining room, in which Welsh, McGinty, and Anthony Markitell took part.

stated that since Miller was the kind of person who would report everything he found out to the Union, Miller could not work for him anymore. I accordingly find that the allegations of the complaint so far as it alleges that Miller was discriminatorily discharged on or about September 27, 1949, and thereafter was discriminatorily refused reinstatement have not been sustained by the required preponderance of evidence and the complaint in that respect should be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents, set forth in section III, above, occurring in connection with the operations of the Respondents set forth 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 Respondents engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and that they take affirmative action designed to effectuate the policies of the Act.

Having found that the Respondents have discriminated against William Cole, Bennie Di Rito, George Hopkins, and Harry Taylor in regard to their hire and tenure of employment, I shall recommend that the Respondents offer them immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and that the Respondents also make each of them whole for any loss of pay he may have suffered by reason of the Respondents' discrimination against him, by payment to each of them of a sum of money covering his loss of pay, such loss of pay to be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondents' discriminatory action to the date of the offer of reinstatement. The quarterly periods, hereinafter called "quarters," shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which he normally would have earned for each quarter or portion thereof, his net earnings,¹¹ if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter. I shall further recommend that the Respondents, upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records and reports, and all other records necessary to analyze the amounts of back pay due and the right of reinstatement under the terms of this recommended order.¹²

I shall also recommend that the complaint, so far as it alleges that the Respondents discriminated in regard to the hire and tenure of employment of William F. Miller, be dismissed.

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

¹¹ 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 Respondents, which would not have been incurred but for the unlawful discrimination against him and the consequent necessity of his seeking employment elsewhere. See *Crossett Lumber Company*, 8 NLRB 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.

¹² See *F. W. Woolworth Company*, 90 NLRB 239.

CONCLUSIONS OF LAW

1. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1214, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. By discriminating in regard to the hire and tenure of employment of William Cole, Bennie Di Rito, George Hopkins, and Harry Taylor, and thereby discouraging membership in Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1214, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) 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

5. The Respondents have not violated Section 8 (a) (3) of the Act by discharging William Miller and thereafter refusing to reinstate him.

[Recommended Order omitted from publication in this volume.]

CALERA MINING COMPANY *and* INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS *and* ROBERT E. STRONG. *Cases Nos. 19-CA-361 and 19-CA-362. January 3, 1952*

Decision and Order

On June 4, 1951, Trial Examiner James R. Hemingway issued his Intermediate Report in the above-entitled consolidated 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 the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this proceeding to a three-member panel [Chairman Herzog and Members Murdock and Styles].

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 the brief, 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.