UNION BUS TERMINAL OF DALLAS, INC. *and* TRANSPORT WORKERS UNION OF AMERICA, CIO. *Case No. 16–CA–228. March 5, 1952*

Supplemental Decision and Order

On November 30, 1951, the Board issued its Decision and Order in the above-entitled case.[1] On December 7, 1951, the Union filed a motion for rehearing, in which it requested the Board to reconsider its Decision and Order. The Union asserts that the Board erred in dismissing the complaint in its entirety, by failing to find (1) that the Respondent refused to bargain in good faith with the Union in violation of Section 8 (a) (5) of the Act; (2) that the strike of December 24, 1949, was caused by the Respondent's unfair labor practices; (3) that the Respondent's notice of December 26, 1949, to the strikers violated Section 8 (a) (3) and (1) of the Act; (4) that the replacements employed on January 10, 1950, were temporary replacements; and (5) that job vacancies existed on January 10, 1950.

The Union's request for oral argument is denied because the record and the Union's motion, in our opinion, adequately present the issues and positions of the parties.

After consideration of the Union's motion in the light of the entire record in this case, the Board, for the reasons stated in its original Decision and Order in this matter, hereby denies the motion,[2] except in the following respect:

Our finding that the jobs of all 30 strikers had been filled by permanent replacements on January 10, 1950, was erroneous with respect to one job, that of Betty Lundy, an information clerk. We must therefore reconsider the allegation in the complaint, as it applies to Lundy, that the strikers applied for reinstatement on January 10 and that the Respondent discriminatorily refused to reinstate them because of their union or concerted activities.

On January 10, 1950, in a letter presented to the Respondent, the Union made an offer on behalf of the strikers to return to work. The Respondent made no reply to this letter. These facts comprise the *prima facie* case of discrimination against the Respondent.

In defense, the Respondent contends initially that the Union's January 10 letter was not an unconditional offer on behalf of the strikers to return to work. However, as found by the Trial Examiner and as stated in our original Decision and Order, we find that the January 10 offer was unconditionally made.

[1] 97 NLRB 206.

[2] In further support of the dismissal of the 8 (a) (5) allegation in the complaint, see *The Advertiser Company, Inc.*, 97 NLRB 604.

The Respondent further contends, as reflected by testimony at the hearing and in its briefs, that it was under no obligation to return any of the strikers to work for two reasons: (1) Each of the strikers had precipitately terminated his or her employment, not only by striking on December 24, 1949, but also by continuing on strike instead of returning to work upon receipt of the Respondent's telegram 2 days later; and (2) the strikers were, before the January 10 offer to return to work, permanently replaced.

The latter reason is, in our view, of no moment. For even assuming that the replacement hired for Lundy was permanent, the replacement was discharged before January 10, and the Lundy job remained vacant through that date. The Union's January 10 offer to return was an application for that vacancy as well as for other jobs. The Respondent did not reply to the offer because, in its view, the strikers' continuing concerted activities relieved it of any obligation to consider applications by strikers for vacancies. As the Respondent's refusal to consider this application was therefore admittedly motivated by the strikers' concerted activity, it is clear that that action was discriminatory. Because this discriminatory action of the Respondent deprived Lundy of being placed in the job she formerly held, we find that the Respondent discriminated against her in violation of Section 8 (a) (3) and (1).[3]

The activities of the Respondent set forth above, occurring in connection with the operations of the Respondent described in section I of the Intermediate Report,[4] have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

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

[3] See *National Grinding Wheel Company, Inc.*, 75 NLRB 905, 907–8. *Member Murdock* desires to make clear that he joins in the conclusion that Respondent violated the Act by refusing to act favorably on Lundy's application for the vacancy in her old job, solely because he believes that a nondiscriminatorily motivated employer would normally prefer an old experienced employee for a vacancy rather than hire an untried outsider, absent evidence not here present of a specific valid reason for preferring the outsider. Consistent with this theory that Lundy was discriminated against as an applicant for new employment he would simply order her instatement with back pay, rather than reinstatement "without prejudice to her seniority or other rights and privileges" as the Board's order provides. He would not reach or decide the question whether as a matter of law an initial permanent replacement of an economic striker permanently extinguishes her preexisting right to return to her job, or whether, if the replacement has fortuitously vacated the job when there is outstanding an unconditional offer to return to work, the striker then becomes revested with the same right which she had prior to the permanent replacement, to return to her job "without prejudice to her seniority or other rights and privileges."

[4] Attached to the original Decision and Order in this case, 97 NLRB 206.

It has been found the Respondent has discriminated in regard to the hire and tenure of Betty Lundy. We shall order that the Respondent offer to her immediate reinstatement in her former or substantially equivalent position,[5] without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay she may have suffered as a result of the discrimination against her, by payment to her of a sum of money equal to that which she would have earned as wages from January 10, 1950, to November 30, 1951, the date of the original Decision and Order in this matter, and from the date of this supplemental Decision and Order to the date of offer of reinstatement. Loss of pay will be computed on the basis of each separate calendar quarter or portion thereof in the manner established by the Board in the case of *F. W. Woolworth Co.*, 90 NLRB 289. Loss of pay shall be determined by deducting from a sum equal to that which she would normally have earned for each quarter or portion thereof, her net earnings,[6] 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. In accordance with the *Woolworth* decision, *supra*, we shall also order that the Respondent, upon reasonable request, make available to the Board and its agents all records pertinent to an analysis of the amount due as back pay.

The unfair labor practice found reveals on the part of the Respondent such an antipathy to the objectives of the Act as to justify an inference that the commission of other unfair labor practices may be anticipated. The preventive purposes of the Act may be frustrated unless our order is coextensive with the threat. We shall therefore order that the Respondent cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by the Act.

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

Conclusions of Law

1. Transport Workers Union of America, CIO, 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, 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 rights guaranteed in Section 7 of the Act, the

[5] *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827.

[6] *Crossett Lumber Company*, 8 NLRB 440.

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.

Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the Board orders that Union Bus Terminal of Dallas, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Transport Workers Union of America, CIO, or in any other labor organization of its employees, by discriminatorily discharging or refusing to reinstate any of them, or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of employment.

(b) 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 Transport Workers Union of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective bargaining or other mutual aid or protection, or to refrain from any or all 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 in Section 7 thereof.

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

(a) Offer to Betty Lundy immediate and full reinstatement to her former or substantially equivalent position without prejudice to her seniority or other rights and privileges.

(b) Make whole Betty Lundy in the manner set forth in the section above entitled "The Remedy."

(c) Upon request, make available to the 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.

(d) Post at its terminal in Dallas, Texas, copies of the notice attached hereto and marked "Appendix A."[7] Copies of such notice,

[7] In the event this Order is enforced by decree of a United States Court of Appeals, there shall be substituted for the words, "Pursuant to a Supplemental Decision and Order," the words, "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

to be furnished by the Regional Director for the Sixteenth Region, shall after being duly signed by the Respondent's authorized representative be posted by the Respondent immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from receipt of this Decision and Order what steps the Respondent has taken to comply herewith.

MEMBER HOUSTON took no part in the consideration of the above Supplemental Decision and Order.

Appendix A

NOTICE TO ALL EMPLOYEES

Pursuant to a Supplemental 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 any labor organization of our employees by discriminatorily discharging, laying off, or failing to reinstate any of our employees, or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of employment.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist TRANSPORT WORKERS UNION OF AMERICA, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all 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 offer to Betty Lundy immediate and full reinstatement to her former or substantially equivalent position without loss of seniority or other rights and privileges and make her whole for any loss of pay suffered as a result of the discrimination.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term

or conditions of employment against any employee because of his membership in or activity on behalf of any such labor organization.

UNION BUS TERMINAL OF DALLAS, INC.,
Employer.

By _____
(Representative) (Title)

Dated _____

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

WESTINGHOUSE ELECTRIC CORPORATION *and* WESTINGHOUSE SALARIED EMPLOYEE ASSOCIATION AT SOUTH PHILADELPHIA, AFFILIATED WITH FEDERATION OF WESTINGHOUSE INDEPENDENT SALARIED UNIONS, PETITIONER. *Case No. 4–RC–1293. March 5, 1952*

Decision and Direction of Election

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Harold Kowal, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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 Houston and Styles].

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 organization involved claims 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.

4. The appropriate unit:

The Petitioner currently represents approximately 500 professional employees of the Employer in a unit established by the Board. *Westinghouse Electric Corporation*, 89 NLRB 8. By its petition herein, the Petitioner seeks to add to this group approximately 36 field service engineers, who are not now and never have been represented by any labor organization. The Employer, while admitting that the field service engineers are professional employees, contends that because of their diverse geographical locations they cannot be appropriately represented either as part of the established unit or in a separate unit.

The field service employees are stationed in various parts of the country at Government aviation stations, where they are engaged in supervising the maintenance of, and instructing others in the use of, the equipment manufactured by the Employer. They report at least once a week to the head of the field service department, who supervises them and also supervises the home service engineers and the technical writer attached to his department; the home service engineers and the technical writer are included in the unit currently represented by the Petitioner. The home service engineers answer the technical inquiries made by the field service engineers. They receive about the same amount of pay. Home service engineers have transferred to field service and field service engineers to home service.

In view of the foregoing, and as the Petitioner has expressed its desire to accept these employees as part of the existing unit, we find that the field service engineers may be included in the unit with the employees currently represented by the Petitioner.

The Employer has recently promoted three field service engineers to service area supervisors in three newly established area offices. As these area supervisors have the power effectively to recommend hire and wage increases, they are supervisors within the meaning of the Act and shall be excluded from the unit.

Accordingly, we shall direct an election in Lester, Pennsylvania, in the following voting groups: All aviation gas turbine division field service engineers reporting to the Employer's South Philadelphia Works in Lester, Pennsylvania, excluding all other employees and all supervisors as defined by the Act. If a majority of the field service engineers vote for the Petitioner, they will be taken to have indicated their desire to join the employees in the existing unit; the Petitioner may then bargain for them as part of such unit, and the Regional Director is instructed to issue a certification of representatives to that effect.

[Text of Direction of Election omitted from publication in this volume.]

EATON BROTHERS CORP. *and* TEXTILE WORKERS UNION OF AMERICA, C. I. O. *Case No. 3–CA–365. March 6, 1952*

Decision and Order

On July 11, 1951, Trial Examiner Reeves R. Hilton 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