Order

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

TODD SHIPYARDS CORPORATION, LOS ANGELES DIVISION, A CORPORATION, *and* DENNETT N. GROVER. *Case No. 21–CA–1067. March 26, 1952*

Decision and Order

STATEMENT OF THE CASE.

Upon a charge filed on March 20, 1951, by Dennett N. Grover, an individual, the General Counsel of the National Labor Relations Board, herein called, respectively, the General Counsel and the Board, by the Regional Director for the Twenty-first Region (Los Angeles, California), issued his complaint on June 22, 1951, against Todd Shipyards Corporation, Los Angeles Division, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (a) (1), Section 8 (a) (3), and Section 2 (6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Copies of the complaint, accompanied by notices of hearing thereon, were duly served upon the Respondent and the charging party.

With respect to the unfair labor practices, the complaint alleged in substance that the Respondent, on or about November 27, 1950, discharged Carlos Dillenbach[1] and Dennett N. Grover because they engaged in activities on behalf of "the Union," and thereafter refused reemployment to them because of such activities, and that, by the foregoing acts, Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1), and discriminated in regard to hire or tenure of employment and conditions of employment of its employees to discourage membership in the Union, in violation of Section 8 (a) (3) of the Act.

The Respondent duly filed its answer denying all allegations of unfair labor practices and asserting that Dennett N. Grover and Carlos Dillenbach voluntarily quit its employment.

Pursuant to notice, a hearing was held at Los Angeles, California, from August 20 to August 23, 1951, inclusive, before William E. Spencer, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented

[1] Also referred to in the record as Dillenbeck.

by counsel, who 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. The Board[2] 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.

On September 5, 1951, the Trial Examiner issued his Intermediate Report, copies of which were duly served upon the parties. He found that the Respondent unlawfully discharged Dillenbach and recommended his reinstatement with back pay. He also found that the Respondent did not engage in any unfair labor practice with respect to Grover, and recommended dismissal of the complaint insofar as it so alleged.[3] Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case. Because of the nature of the Intermediate Report, we make our own findings, conclusions, and order, as follows:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Todd Shipyards Corporation, a corporation existing by virtue of the laws of the State of New York, is engaged in, and, at all times material herein, has been engaged in, ship construction, repair, and conversion at its Los Angeles, California, shipyards, and at other shipyards in numerous States of the United States. During the last 12 months immediately preceding the issuance of the complaint herein, the Respondent, in the course and conduct of its Los Angeles, California, shipyards, caused materials, equipment, and supplies, valued in excess of $500,000 to be acquired, purchased, transported, and delivered in commerce from and through States of the United States other than the State of California to its place of business in Los Angeles, California. During the same period, at its Los Angeles, California, shipyards, the Respondent constructed, repaired, and installed equipment, and rendered services, valued in excess of $3,000,000, to vessels engaged in interstate commerce.

The Respondent concedes, and we find, that it is engaged in commerce within the meaning of the Act.

[2] 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 Styles].

[3] As no exception has been filed to the Trial Examiner's findings and recommendation as to Grover, we shall dismiss the portion of the complaint alleging that the Respondent unlawfully discharged Grover.

II. THE LABOR ORGANIZATION INVOLVED

Industrial Union of Marine Shipbuilding Workers of America, CIO, Local No. 9, herein called the Union, is a labor organization admitting to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

A. *The constructive discharge of Carlos Dillenbach; interference restraint, and coercion*

Carlos Dillenbach was first employed by the Respondent in July 1946, and worked in various capacities for the Respondent at its shipyard in San Pedro, California, until November 27, 1950. At least since September 12, 1949, with a minor exception, he worked on the swing shift from 4:30 p. m. to 12:30 a. m.; and, at least since June 13, 1950, he was employed continuously as a chipper and caulker.

In September 1949 Dillenbach enrolled in a junior college under the GI Bill of Rights and attended classes during the daytime with the knowledge of the Respondent, as will hereinafter more fully appear. He played college football and engaged in other activities outside his work. As a result of these outside activities, he sometimes reported late for work or was absent. However, he was an hourly paid worker, and usually he obtained permission from management to be absent or late. His foreman, William Mulholland, was of the opinion that there was room for improvement in Dillenbach's work as a chipper and caulker. However, no complaint was ever made to Dillenbach about his work, tardiness, or absences.

The Union had a union-shop contract with the Respondent covering in substance all its San Pedro production and maintenance employees. This contract, dated August 16, 1950, and to be in force for at least 2 years from July 27, 1950, contained provisions for a grievance procedure.

On or about October 27, 1950, in a conversation between certain management representatives, including Foreman Mulholland, and two lead men who worked on the day shift, the lead men suggested in substance that they could help Dillenbach with his work if he were transferred to the day shift. However, no decision to make such a transfer was reached at this time.

On or about November 3, 1950, Dillenbach was laid off for about 1 week hence as part of a reduction in force. Sometime thereafter, on or about November 10, 1950, he complained to the union grievance committee that the Respondent had transferred an employee in another job classification, a riveter, to take Dillenbach's place during his lay-

off. The union grievance committee decided not to press Dillenbach's complaint as a formal grievance under the provisions of the existing contract, because the 5-day period allowed in the contract for the filing of a grievance had by then expired. Instead, William F. Estes, chairman of the union grievance committee, orally brought Dillenbach's complaint to the attention of his foreman, William Mulholland, who replied in substance that he had acted under orders of his superiors in replacing Dillenbach.[4] An appeal to higher management authority was also unsuccessful.

About midway during the swing shift on November 14, 1950, Dillenbach was again laid off. He was recalled on November 16. On November 22, 1950, at the insistence of Dillenbach, the union grievance committee presented to Foreman Mulholland a written grievance to the effect that during Dillenbach's layoff which ended on November 16, the Respondent used a riveter to do work which should have been performed by Dillenbach as a chipper and caulker.

In the course of the conversation which ensued between Mulholland and the union grievance committee, Mulholland complained in substance about Dillenbach's tardiness and absences and stated that he, Mulholland, had been contemplating transferring Dillenbach to the day shift. In addition, according to the testimony of Estes, Mulholland stated:

> . . . I know who made that grievance. That was Dillenbach made that grievance. . . . I can tell you just exactly what I am going to do about it. . . . I will deprive him of his livelihood, because he is a G. I. going to school, . . . he can't work daytimes, and I will transfer him. . . . In fact, I think I will go in and write it out right now, anyway.

Union Committeemen John Ferracioli and Ephriam B. Snow corroborated Estes' testimony.[5] Mulholland denied that he made the quoted statement to the union grievance committee. The Trial Examiner credited Estes' testimony. In view of the fact that the Trial Examiner observed the demeanor of the witnesses and the further fact that Estes' testimony was supported in all essential respects by

[4] This finding is based upon the testimony of Estes. Mulholland denied that he was approached by any union representative concerning any grievance relating to Dillenbach *before* November 22, 1950. Like the Trial Examiner, we credit Estes' testimony.

[5] According to Ferracioli's testimony, Mulholland stated:

> I think I will go out there and write out a transfer to day shift. . . . I think I will deprive him (Dillenbach) of his livelihood . . . in the shipyard because I know he is going to the G. I. school so I know that man can't work on the day shift.

Snow testified that Mulholland stated:

> I know who filed the grievance. It was Dillenbeck. He comes in late one or two nights a week, and then is always hollering about something. . . . If he wanted to be like that . . . he is going to school and can't work days; if I transfer him to days it will deprive him of his livelihood here. I think I will go in now and write up the transfer for him.

that of Ferracioli and Snow, we also credit Estes' testimony and find that Mulholland made the quoted statement attributed to him.

Representing that they wished to talk to Dillenbach "to get him straightened out," the union grievance committee induced Mulholland to agree to withhold the transfer for a day or two.

November 23 was Thanksgiving. Sometime between November 22 and the end of the swing shift of November 24, the union grievance committee persuaded Dillenbach to drop his grievance.

At the end of the swing shift of November 24, the union grievance committee not having communicated with Mulholland in the interim, Mulholland transferred Dillenbach to the day shift.

On the next workday, November 27, 1950, Dillenbach conferred with LeRoy B. Zust, the Respondent's division director of personnel and labor relations. When Zust refused to revoke the transfer, Dillenbach quit, rather than abandon his schooling, and signed an "Employee Status Notice" form at Zust's request, which so stated.

B. *Conclusions*

The Respondent contends that it did not transfer Dillenbach from the swing to the day shift because of his union membership or activities, and that Dillenbach voluntarily quit his employment. On the basis of the facts set forth in Section III, A, above, particularly the statements made by Foreman Mulholland to the union grievance committee on November 22, 1950, it is clear, and we find, as did the Trial Examiner, that Foreman Mulholland transferred Dillenbach from the swing to the day shift *because* he had lodged with Mulholland a complaint concerning the terms and conditions of his employment. It may be true that, for at least a month before November 22, Mulholland contemplated transferring Dillenbach to the day shift because of economic reasons, but no decision to make the transfer was made until at least November 22, when Mulholland stated to the union grievance committee that he would transfer Dillenbach because ". . . Dillenbach made that grievance." Absent the filing of the grievance, we believe that the Respondent would not have transferred Dillenbach at that time. We agree with the Trial Examiner that the transfer was precipitated by the filing of the grievance. We conclude therefore that the Respondent transferred Dillenbach from the swing to the day shift because he filed a grievance. Dillenbach's grievance was sponsored by the Union and presented by it to the Respondent. Section 7 of the Act protected Dillenbach in filing the grievance, as such activity was a concerted or union activity. In transferring Dillenbach because he filed a grievance, the Respondent sought to penalize Dillen-

bach for exercising rights protected by the Act, and thus infringed these rights.[6]

Under the circumstances, we reject the Respondent's contention that Dillenbach voluntarily quit his employment. While, at the request of the Respondent's personnel director, Dillenbach signed a form reciting, "Voluntarily quit—cannot work day," it is clear, and we find, that Dillenbach quit, when transferred, rather than abandon his schooling. As we found above, the transfer infringed rights guaranteed under the Act. Moreover, Mulholland transferred Dillenbach for the very purpose of compelling him to quit, and in this Mulholland achieved his purpose. Under the circumstances, we conclude, as did the Trial Examiner, that the Respondent constructively discharged Dillenbach, on or about November 27, 1950, because he filed a grievance with his employer.[7]

Once a violation of the statute is shown, contrary to the Respondent's contention, it is immaterial that previous thereto the Respondent engaged in no unfair labor practice, demonstrated no hostility toward the Union, or enjoyed an amicable relationship of long standing with the Union.

The Respondent also contends that, in any event, the complaint should be dismissed as to Dillenbach because of his failure to exhaust the remedies available to him under the grievance provisions of the collective bargaining agreement. The record shows that the Union filed a grievance, protesting Dillenbach's transfer, but that the Respondent refused to grant any relief; neither the Union nor Dillenbach sought arbitration, as permitted by the contract. Nevertheless, we find no merit in the Respondent's contention, as Section 10 (a) of the Act, as amended, expressly provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."[8]

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[6] As stated by the Court of Appeals for the Tenth Circuit in *Continental Oil Co.* v. *N. L. R. B.*, 113 F. 2d 473, 484, aff'd. in 313 U S. 212:

> The act does not interfere with the exercise of the normal right of an employer to discharge or transfer employees in the course of business. . . . But there is little room for doubt that the transfer of an employee, . . . traceable to membership in a labor union or to activities on behalf of a bargaining agency, constitutes discrimination within the interdiction of Section 8 (1) and (3).

[7] The Board has held, and the courts have sustained the Board in this position, that where an employee is transferred, demoted, or otherwise discriminated against because of union activity, he need not submit to such discrimination, but may quit work and his separation from employment in these circumstances is deemed as equivalent to a discharge and to be remedied in the same manner See, for example, *N. L. R. B.* v *Star Publishing Co.*, 97 F. 2d 465, 468–471 (C. A. 9); *N. L. R. B.* v. *American Potash and Chemical Corp*, 98 F. 2d 488, 493–494 (C. A. 9).

[8] See, for example, *Kinner Motors*, 59 NLRB 905; *N. L. R. B.* v. *Walt Disney Productions*, 146 F. 2d 44 (C. A. 9), enfg. as mod. 48 NLRB 892.

Accordingly, we find, as did the Trial Examiner, that, by constructively discharging Dillenbach, the Respondent interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1), and discriminated in regard to hire or tenure of employment to discourage membership in a labor organization, in violation of Section 8 (a) (3) of the Act, thereby interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act. Whether the Respondent's conduct be viewed as a violation of Section 8 (a) (3) or Section 8 (a) (1) of the Act, or both, the remedy as set forth in section V herein, entitled "The Remedy," is appropriate and necessary to correct the unfair labor practice involved herein.

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 business 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 engaged in 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.

As we have found that Carlos Dillenbach was discriminatorily discharged, we shall order the Respondent to offer him reinstatement to his former or a substantially equivalent position [9] without prejudice to his seniority and other rights and privileges. We shall further order the Respondent to make whole Dillenbach for any loss of pay that he may have suffered as a result of the discrimination. Such loss of pay on the part of Dillenbach shall be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to the date of a proper offer of reinstatement.[10] 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 which Dillenbach would normally have earned for each quarter or portions thereof,

[9] As to what constitutes a substantially equivalent position, see *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827.

[10] *F. W. Woolworth Company*, 90 NLRB 289.

his net earnings,[11] if any, in other employment during that period. Earnings in one particular quarter shall have no offect upon the back-pay liability for any other quarter.

We shall further order, in accordance with our decision in *F. W. Woolworth Company*, cited *supra*, that the Respondent, upon request, make available to the Board and its agents all payroll and other records pertinent to a determination of the amount of back pay due and the right of reinstatement under the terms of our Order.

Normally, in discriminatory discharge cases, we require the offending employer to cease and desist from in any manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. The Trial Examiner did not recommend the entry of such a broad order because he believed that the Respondent has "no desire or intention of interfering with the rights of employees generally." No exception has been filed to his failure to make such a recommendation. In view thereof, we shall not issue a broad cease and desist order.

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. Todd Shipyards Corporation, Los Angeles Division, a corporation, existing by virtue of the laws of the State of New York, is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.
2. The Industrial Union of Marine and Shipbuilding Workers of America, CIO, Local No. 9, is a labor organization admitting to membership employees of the Respondent.
3. By discriminating in regard to the hire and tenure of employment and conditions of employment of Carlos Dillenbach, the Respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (a) (3) of the Act.
4. 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.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

[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 respondent, which would not have been incurred but for his unlawful discharge, and the subsequent necessity for 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 earnings. See *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7.

6. The Respondent has not engaged in any unfair labor practices by the alleged discharge of Dennett N. Grover.

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, Todd Shipyards Corporation, Los Angeles Division, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Industrial Union of Marine and Shipbuilding Workers of America, CIO, Local No. 9, or in any other labor organization, by discriminatorily discharging any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment, or term or condition of employment.

(b) In any like or related 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 Industrial Union of Marine and Shipbuilding Workers of America, CIO, Local No. 9, or any other labor organization, 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 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 National Labor Relations Act.

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

(a) Offer to Carlos Dillenbach immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make whole Carlos Dillenbach, in the manner set forth above in the section entitled "The Remedy."

(c) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all records necessary for a determination of the amount of back pay due and the right of reinstatement under the terms of this Order.

(d) Post at its shipyards in San Pedro, California, copies of the notices attached hereto marked "Appendix A." [12] 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

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

posted by the Respondent immediately upon receipt thereof, and maintained by it 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 Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondent discharged Dennett N. Grover in violation of Section 8 (a) (3) and Section 8 (a) (1) 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 INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, CIO, LOCAL No. 9, or in any other labor organization, by discriminatorily discharging any employee, or by discriminating in any other manner in regard to hire or tenure of employment, or any term or condition of employment.

WE WILL NOT in any like or related 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 INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, CIO, LOCAL No. 9, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes 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 National Labor Relations Act.

WE WILL OFFER Carlos Dillenbach immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of discrimination.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of the exercise of any right guaranteed by the National Labor Relations Act.

TODD SHIPYARDS CORPORATION,
LOS ANGELES DIVISION

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.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL NO. 621 *and* THOMAS K. VOWELL. *Case No. 10–CB–98. March 26, 1952*

Decision and Order

On September 24, 1951, Trial Examiner J. J. Fitzpatrick issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaged 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.

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 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 entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions:

1. M. G. Hughett, general manager of Sesco Contractors, testified that, in late December 1950 or in the early part of January 1951, E. R. Clifton, the Respondent's business agent, objected to the continued employment of Thomas K. Vowell by Sesco Contractors, stating to Hughett that Vowell "was not a member in good standing or did not belong." Clifton denied that he ever asked Sesco Contractors to refuse employment to Vowell. The Trial Examiner did not credit Clifton's denial. Under the circumstances, we credit Hughett's testi-