

PIERCE BROTHERS MORTUARIES and MORTUARY EMPLOYEES UNION,
LOCAL NO. 151, INTERNATIONAL BROTHERHOOD OF FIREMEN AND OIL-
ERS, A. F. OF L. Case No. 21-CA-1270. May 1, 1952

Decision and Order

On March 14, 1952, Trial Examiner Martin S. Bennett 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.

The Board¹ has reviewed the rulings of the Trial Examiner made 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 addition.

At the hearing the Respondent moved to dismiss the complaint on the ground that the Board had no jurisdiction over its operations and that the purposes of the Act would not be effectuated by the assertion of jurisdiction in this proceeding. The Trial Examiner denied the motion and found that the Respondent is engaged in commerce. The Respondent has excepted to this finding. We find no merit in this exception. At the hearing, the Respondent, while denying that it was engaged in commerce within the meaning of the Act, offered no new evidence with respect to commerce, but stipulated that the nature and volume of its business had continued unchanged since the prior Board proceeding involving the Respondent.² The Board heretofore asserted jurisdiction over the Respondent in two prior proceedings involving the Respondent,³ and contrary to the contentions of the Re-

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 [Members Houston, Murdock, and Styles].

² *Pierce Brothers*, 97 NLRB 317.

³ *Pierce Brothers*, *supra*; *Utter McKinley Mortuaries, et al.* (including *Pierce Brothers Mortuaries*, Case No. 21-RC-2226), 98 NLRB 450.

spondent we find no basis on the present record for reconsidering those decisions.

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, Pierce Brothers Mortuaries, Los Angeles, 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 discriminatorily refusing to reinstate any of its employees or by discriminating against its employees in any manner with respect to their hire or tenure of employment or any term or condition thereof.

(b) In any manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, 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, 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 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.

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

(a) Offer to David F. Keath, Lloyd E. McMullen, Ulden I. Smith, Clifford A. Todd, and Arthur L. Woodmansee immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make whole the above-named five individuals for any loss of pay they may have suffered by reason of the discrimination against them in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(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 its offices and places of business copies of the notice

attached to the Intermediate Report as Appendix A.⁴ Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by Respondent's authorized representative, be posted by it 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 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 Respondent has taken to comply herewith.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

A charge having been duly filed by Mortuary Employees Union, Local No. 151, International Brotherhood of Firemen and Oilers, A. F. of L., herein called the Union, against Pierce Brothers Mortuaries, herein called Respondent, the General Counsel of the National Labor Relations Board issued a complaint dated January 17, 1952, against Respondent. This complaint, upon which the instant proceeding is based, alleged that Respondent had engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. Copies of the charge, complaint, and notice of hearing thereon were duly served upon the parties.

Specifically, the complaint alleged that (1) between March 27 and 31, 1951, Respondent had discharged a group of its employees; (2) in *Pierce Brothers*, 21-CA-1078, 97 NLRB 317, issued December 10, 1951, the National Labor Relations Board found that these earlier discharges constituted unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act; (3) as a direct result of and in protest of the aforesaid unlawful conduct on the part of the Respondent, various employees, including some or all of the earlier dischargees, had engaged in picketing of Respondent's various premises; (4) said picketing had terminated on or about August 1, 1951; and (5) since the latter date, Respondent has refused the unconditional application for reinstatement by five employees¹ who had ceased work because of and as a result of the foregoing concerted activities. Respondent's duly filed answer denied that it was engaged in commerce within the meaning of the Act, disputed the jurisdiction of the Board, and denied the commission of any unfair labor practices.

⁴ This notice, however, shall be, and it hereby is, amended by striking from line 4 thereof the words "The Recommendations of a Trial Examiner" and substituting in lieu thereof the words "A Decision and Order" In the event that this Order is enforced by a 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."

¹ Their names are Ulden I. Smith, Clifford A. Todd, Lloyd E. McMullen, Arthur L. Woodmansee, and David F. Keath; the pleadings and transcript were amended to reflect the correct name of the latter.

Pursuant to notice, a hearing was held at Los Angeles, California, on March 3 and 4, 1952, before the undersigned Trial Examiner, Martin S. Bennett. The General Counsel and Respondent were represented by counsel who were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the outset of the hearing, the undersigned denied a motion by Respondent to dismiss the complaint on the grounds that the Board did not have jurisdiction over its operations and that the purposes of the Act would not be effectuated by the assertion of jurisdiction herein. Thereupon, and despite the announcement by the undersigned that the hearing would continue with the litigation of the issues raised by the complaint, counsel for Respondent withdrew from the hearing, stating that Respondent chose to rest its defense solely upon the jurisdictional issue. No request was made by Respondent to present oral argument or to file briefs or proposed findings and conclusions with the undersigned. At the close of the hearing, the General Counsel waived the right to argue orally and to file briefs and/or proposed findings and conclusions.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Pierce Brothers Mortuaries is a California corporation which is engaged in the undertaking business at 15 locations in the Los Angeles area of the State of California. In a recent proceeding, *Pierce Brothers*, 97 NLRB 317, the National Labor Relations Board found that Respondent was engaged in commerce within the meaning of the Act. At the present hearing, Respondent, although denying that it was engaged in commerce, offered no new evidence with respect to commerce and stipulated that the nature and volume of its business had continued unchanged since the prior Board proceeding. Accordingly, the undersigned finds that Respondent is engaged in commerce within the meaning of the Act. See *N. L. R. B. v. Worcester Woolen Mills Corp.*, 170 F. 2d 13 (C. A. 1), cert. denied 336 U. S. 903.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE UNFAIR LABOR PRACTICES

A. *The discrimination against the complainants; interference, restraint, and coercion*

1. The facts

There is no dispute with respect to the factual history of a union campaign among Respondent's employees and events resulting therefrom. As found in the earlier proceeding, *Pierce Brothers, supra*, a number of Respondent's employees were discharged between March 27 and March 29, 1951, because of their union and concerted activities. Business Representative Browne Hamilton of the Union requested Respondent to reinstate these earlier discharges. The request

was either refused or ignored and, as a result, picket lines were established by the Union on or about April 4, 1951, at Respondent's various mortuaries. The pickets included at least some of those found in the earlier proceeding to have been discriminatorily discharged as well as various mortuary employees, including four of the five present complainants.² That all of the complainants, save Smith, were engaged in the picketing was observed by various officials of the Respondent.

On May 4, 1951, identical letters were sent to the five complainants by officials of Respondent. These stated that Respondent was in receipt of an "amended complaint"³ that the recipient of the letter had been discharged for union activities. The letter went on to state that the respective complainants had not been discharged; that their failure to report for work had been construed by Respondent as a voluntary termination of employment; that their respective positions were open and available to them; that Respondent would be pleased by a resumption of their employment; and that there would be no discrimination for union activities.

Three of the five complainants replied to this letter. Lloyd McMullen wrote to Respondent on May 7 and stated, *inter alia*, that, "I am ready, willing, and able to return to work and will be pleased to do so, when the labor difficulty with which you are now confronted, has been brought to an amiable conclusion, for as a good union member I cannot in good conscience cross the picket line." Clifford Todd made a similar statement in a letter sent to Respondent on May 12, and, as noted, in a letter sent on or about May 20, Ulden Smith wrote Respondent to the effect that she would return to work when the labor difficulty was over because she was unwilling to cross the picket line. The remaining two complainants, Keath and Woodmansee, sent no letters but picketed along with other pickets and complainants, these activities being within the observation of management representatives.

The picketing was called off by the Union effective August 1, 1951. On that date, Business Agent Hamilton wrote to Respondent as follows:

Please be advised that the Mortuary Employees Union, Local #151, have withdrawn their pickets effective August 1, 1951.

The Union herewith requests reinstatement to their former positions of the following employees, who are Union members and who refrained from reporting for work because of the picketing by the Union:

David F. Keath
Lloyd E. McMullen
Ulden I. Smith
Clifford A. Todd
Arthur L. Woodmansee

Please advise the undersigned when the above-named employees shall report for work.

No reply was received by Hamilton and at no time has Respondent offered to reinstate any of the five complainants.

² The fifth, Ulden Smith, lives 7½ miles from her place of employment, the Van Nuys Mortuary, and did not picket. However, she notified Respondent, in a letter sent on or about May 20, that she was absent from work because of her refusal to cross the picket line at the Van Nuys Mortuary, as was in fact the case. She, as well as the other four complainants, was a member of the Union.

³ The record does not clarify the precise nature of this "amended complaint." In any event, the Union did submit a timely charge in the instant proceeding with respect to the five complainants.

2. Conclusions

It is clear from the foregoing that Respondent's employees engaged in a strike and picketed in protest of the discriminatory discharge of their fellow union members and coworkers. Inasmuch as these earlier discharges constituted unfair labor practices, the strikers who struck in protest of these discharges became unfair labor practice strikers. Moreover, Respondent was on notice that the five complainants were on strike and had withheld their employment as a result of these unfair labor practices and, in fact, four of them participated in the picketing. Finally, when unconditional application for reinstatement was made in their behalf, this request was ignored. Being unfair labor practice strikers, it is established law that their right to reinstatement was absolute, irrespective of whether their positions had been filled in the interim. The undersigned accordingly finds that Respondent discriminatorily denied reinstatement on and after August 1, 1951, to the five complainants herein. *N. L. R. B. v. Mackay Radio and Telegraph Co.*, 304 U. S. 333; *N. L. R. B. v. Star Beef Co.*, 193 F. 2d 8 (C. A. 1); *N. L. R. B. v. Remington Rand, Inc.*, 130 F. 2d 912 (C. A. 2); *N. L. R. B. v. Greensboro Coca-Cola Bottling Co.*, 180 F. 2d 840 (C. A. 4); *Olin Industries v. N. L. R. B.*, 191 F. 2d 613 (C. A. 5); and *N. L. R. B. v. Sunshine Mining Co.*, 110 F. 2d (C. A. 9), cert. denied 312 U. S. 678.

Moreover, even assuming that these strikers were economic strikers, it is clear that the failure to reinstate them was discriminatory. For there is no evidence or contention that they had been replaced prior to their application for reinstatement. In such a posture, the failure to reinstate them, after their unconditional request to return to work, is equally violative of the Act. *N. L. R. B. v. Globe Wireless, Ltd.*, 193 F. 2d 748 (C. A. 9).

In view of the foregoing, the undersigned finds that Respondent has discriminated with respect to the hire and tenure of employment of the five complainants who were members of the Union and who had engaged in a concerted activity protected by the Act and that Respondent has thereby engaged in conduct violative of Section 8 (a) (1) of the Act. Under the circumstances present herein, the undersigned further finds that the discharges tended to discourage adherence to the Union and were consequently violative of Section 8 (a) (3) of the Act. *N. L. R. B. v. Kennametal, Inc.*, 182 F. 2d 817 (C. A. 3). Furthermore, it is immaterial whether these discharges be termed violative of Section 8 (a) (1) or 8 (a) (3), for, in either event, the remedy applied by the Board is identical. *Smith Victory Corporation*, 90 NLRB 2089, enf'd. 190 F. 2d 56 (C. A. 2), and *Ohio Oil Company*, 92 NLRB 1597.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in Section III, above, occurring in connection with Respondent's operations 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 thereof.

V. THE REMEDY

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

It has been found that Respondent has discriminated against the five complainants herein by discharging them as a result of their union and concerted

activities. The undersigned will therefore recommend that Respondent offer them full and immediate reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges. See *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827. It will further be recommended that Respondent make them whole for any loss of pay they may have suffered by reason of the discrimination against them. Said loss of pay, based upon earnings which they normally would have earned from the date of discrimination to the date of Respondent's offer of reinstatement, less net earnings, shall be computed on a quarterly calendar basis in accordance with the formula adopted by the Board in *F. W. Woolworth Co.*, 90 NLRB 289. See *Crossett Lumber Co.*, 8 NLRB 440.

In view of the nature of the unfair labor practices found, it will be recommended, in order to afford the employees of Respondent the full rights guaranteed them by the Act, that Respondent cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

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

CONCLUSIONS OF LAW

1. Mortuary Employees Union, Local No. 151, International Brotherhood of Firemen and Oilers, A. F. of L., is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating with respect to the hire and tenure of employment of David F. Keath, Lloyd E. McMullen, Ulden I. Smith, Clifford A. Todd, and Arthur L. Woodmansee, thereby discouraging membership in the Union, 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 by Section 7 of the Act, 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.

[Recommendations omitted from publication in this volume.]

Appendix A

NOTICE TO ALL EMPLOYEES

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

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 discriminatorily refusing 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 thereof.

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 **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, and to engage in other 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 a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL offer to the five individuals whose names are listed below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of our discrimination against them:

David F. Keath

Clifford A. Todd

Lloyd E. McMullen

Arthur L. Woodmansee

Ulden I. Smith

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named union or of any other labor organization, except to the extent above stated.

PIERCE BROTHERS MORTUARIES,

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.

EDITORIAL "EL IMPARCIAL" INC. and CIRCULO DE PRENSA (GREMIO DE PERIODISTAS PUERTORRIQUENOS). *Case No. 24-CA-104. May 6, 1952*

Decision and Order

On November 15, 1951, Trial Examiner Ralph Winkler¹ 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. The Trial Examiner also found that the Respondent had not engaged in certain other alleged unfair labor practices. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

¹ As Trial Examiner MacCullen, who heard the testimony in this proceeding, was not available to prepare the Intermediate Report herein, we find without merit the Respondent's exceptions to the preparation of the Intermediate Report by Trial Examiner Winkler. Administrative Procedure Act, Section 5 (c), 5 U. S. C. Sec. 1004 (c). *N. L. R. B. v. Stocker Manufacturing Company*, 185 F. 2d 451 (C. A. 3).