

jurisdiction in this case, and that reason and logic as well as past decisions of the Board require us to do so in order to best effectuate the policies of the Act.

ROBERT H. SNOW, d/b/a AUTO PARTS CO. *and* ARTHUR J. SHUMAN. Case No. 19-CA-740. November 30, 1953

DECISION AND ORDER

On April 13, 1953, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

The Board 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 brief, and the entire record in the case,¹ and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications:

We agree with the Trial Examiner's conclusion that the record does not sustain the complaint allegation that the Respondent violated Section 8 (a) (3) of the Act when it discharged Shuman. In reaching this conclusion, however, we find it unnecessary to adopt the various rationales set out in the Intermediate Report.

It is clear that Shuman's conduct amounted to a refusal to carry out part of his assigned work task and that the Respondent released him for such reason and only for such reason.² As set forth in the Intermediate Report, on his very first day on the job as delivery man Shuman complained to Snow, his employer, that he disliked making deliveries to certain customers of the Respondent where the I.A.M. was maintaining a picket line. Snow advised him that those deliveries were necessary, like all others, and that they would have to be made. The next day Shuman avoided making a similar delivery through the I.A.M. picket line in the course of his work by arranging with a fellow employee to make it for him. Having learned of this, Snow reiterated to Shuman the warning that he would have to do the work assigned him and this time

¹On motion by the General Counsel the Board remanded the case for further evidence. The parties thereafter submitted a stipulation of facts in satisfaction of the remand. We have considered that stipulation as part of the entire case.

²There is no evidence of antiunion bias. That Snow acted only to preserve efficient operation of his business is shown by the fact (stipulated by the parties after the hearing) that he hired a replacement who was willing to make the necessary deliveries without reservation.

added that unless Shuman were willing to do the job the Company had "no use" for him. Shuman still persisted.

We do not consider it material here that that part of Shuman's assigned duties which he chose not to perform were in some manner related to the union activities of employees elsewhere or to Shuman's own union predilections. Therefore we do not adopt the Trial Examiner's comments as to the applicability here of Board or court cases on the issue of concerted activities by employees of diverse employers. Similarly, we find it unnecessary to adopt the Trial Examiner's comments as to the import of the proviso to Section 8 (b) (4) of the Act.

However viewed, and simply stated, Shuman's conduct was a refusal to do the job for which he had been hired and a direct disregard of his employer's instructions. For such conduct he could properly be discharged. Therefore, in accordance with the Trial Examiner's recommendations, we shall dismiss the complaint.

[The Board dismissed the complaint.]

Member Murdock took no part in the consideration of the above Decision and Order.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

This proceeding, brought under Section 10 (b) of the National Labor Relations Act, 61 Stat 136, herein called the Act, is based upon a charge duly filed by Arthur J Shuman, an individual, against Robert H Snow, doing business as Auto Parts Co, herein called Respondent.¹ Pursuant to said charge, the General Counsel of the National Labor Relations Board issued a complaint, dated February 6, 1953, against Respondent, alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act. Copies of the charge, complaint, and notice of hearing thereon were duly served upon Respondent.

Specifically the complaint alleged that Respondent had discharged Arthur J. Shuman on or about November 13, 1952, and had thereafter refused to reinstate him, because he had engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Respondent's answer denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held at Spokane, Washington, on March 10, 1953, before the undersigned Trial Examiner, Martin S. Bennett, duly designated by the Associate Chief Trial Examiner. The parties were represented 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 on the issues. At the close of the hearing, Respondent moved that the complaint be dismissed on the ground that the evidence did not show the commission of any unfair labor practices. Ruling was reserved and the motion is disposed of hereinafter. The parties were afforded an opportunity to file briefs and/or proposed findings and conclusions. Oral argument was waived and a brief has been received from Respondent.²

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

¹ The complaint was amended at the hearing to reflect the name of Respondent as it appears above.

² After the close of the hearing, counsel jointly proffered the current labor agreement covering the employees of Respondent as Respondent's Exhibit No. 1. It is hereby so received.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Robert H. Snow, doing business as Auto Parts Co, maintains his office and place of business in Spokane, Washington, where he is engaged in the wholesaling and retailing of automotive parts, equipment, and accessories in the States of Washington, Idaho, and Montana. Respondent annually purchases and causes to be shipped to his Spokane place of business from points outside the State of Washington, automotive parts, equipment, and accessories valued in excess of \$160,000 Respondent annually furnishes services and materials valued in excess of \$50,000 which are necessary to the operations of other enterprises which are engaged in commerce Respondent admits and I find that he is engaged in commerce within the meaning of the Act

II. THE UNFAIR LABOR PRACTICES

1. The issue

This case squarely presents one issue for decision. May an employer lawfully discharge an employee who, although his normal duties require him to do so, refuses to cross a picket line established by a labor organization at the premises of another employer? In this case, the employee is a member of the labor organization conducting the picketing, and the employees of his own employer are represented by another labor organization to which he, a new employee, does not belong

2. The facts

There is no substantial dispute as to the material facts herein. Arthur J. Shuman commenced his employment with Respondent on November 10, 1952, as a counterman. His duties in that position were to fill orders for parts Two days later, on November 12, it being apparent to both Shuman and Snow, his employer, that Shuman did not possess the requisite familiarity with Respondent's stock of parts, Shuman was transferred by Snow to the position of pickup and delivery man The duties of that post required Shuman to visit other concerns in the area for the purpose of picking up or delivering parts. Shuman's predecessor therein was one Ward Powell, who was transferred to shipping clerk at the same time Shuman was assigned to the position of pickup and delivery man.

On being hired by Snow about 2 weeks prior to November 10, Shuman had informed Snow that he was a member of Automotive Machinists Lodge No. 942, International Association of Machinists, herein called Machinists Snow then informed Shuman that the shop was under contract with Garage Employees' Local Union No. 334, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AF of L, herein called Teamsters, and that Shuman would ultimately have to join that organization. Such a contract did in fact exist at the time and it contained an expiration date of May 31, 1953, with renewal from year to year thereafter absent a 60-day written notice. Its union-security provisions concerning new employees are in conformity with the provisions of the Act, although there is some question whether the contract afforded old employees the requisite 30-day period to join that organization, this, however, is immaterial to a disposition of the present problem, for the complaint raises no issue with respect to the union-security requirements of this contract and the discharge herein did not result from an application of these provisions.

As of November 10, the day that Shuman actually commenced work with Respondent, Machinists had been on strike for some weeks against a number of the new-car dealers in Spokane and was maintaining picket lines at their respective premises. Respondent customarily and regularly did about 50 percent of its pickup and delivery business with these concerns. Shuman was aware of the strike at the time he entered Respondent's employ; there was no labor difficulty or picketing at Respondent's shop.

On November 12, Shuman commenced his duties as pickup and delivery man He discovered that a picket line was being maintained by Machinists at certain premises, known as Hudson Garage, where he was required to make a stop He did cross the line and picked up the necessary part on this occasion On the following day, November 13, Shuman discovered that he would have to make a stop at Buchanan Chevrolet, another of the car dealers being

picketed by Machinists. It being against Shuman's principles to cross any picket line, he confided his concern over this unhappy prospect to Powell, the shipping clerk and his predecessor as pickup and delivery man. Apparently, he had spoken to Powell in a similar vein on the previous day. Powell offered to make the trip to Buchanan Chevrolet on November 13 in Shuman's place and did so.

This incident came to the attention of Snow later that day. Snow was apparently under the impression that Shuman had requested Powell to make this trip for him, although the record indicates the contrary; in either event, the principal issue herein would not be affected. Snow immediately spoke to Shuman, at approximately 3 p. m., and questioned him about the incident. Shuman verified the fact that he was unwilling to cross any picket line, stating it was contrary to his principles, and admitted that Powell had made the trip earlier that day in his place. Snow suggested that Shuman join Teamsters, which the current contract required him to do after 30 days, and thus evade the problem of any responsibility to Machinists. Shuman replied that this would not provide a solution because, whether he joined Teamsters or not, he was still unwilling to cross Machinists' picket line. Snow thereupon discharged him.³

I find that both Shuman and Snow acted in good faith in this crisis. Shuman held strong convictions in the matter and Snow, who generally employed but one pickup and delivery man, as was the case at that time, concluded that Shuman would be of no value to him as an employee if he was unwilling to perform the customary duties of this position which required him to call at these other concerns in the area. As stated, about 50 percent of Respondent's pickup and delivery business was with these picketed concerns. And, according to Snow, his competitors were making these deliveries at the time I find, therefore, that Snow was not motivated by any desire to assist or encourage membership in Teamsters. In fact, Snow knew of Shuman's membership in Machinists at the time he hired him, and had transferred him to another job when he proved to be unsatisfactory in his original position. His decision was solely one, it is found, to terminate an employee who was unwilling, in view of the picket lines, to perform his customary duties.

3. Conclusions

The complainant herein, in sympathy with the objectives of the striking Machinists, refused to cross their picket lines established at the premises of employers other than his own, although his customary duties in the course of his employment required him to call at the premises of these other concerns. There is no evidence that this was done at the behest of Machinists, to which he belonged, although that organization interceded with Respondent and asked Snow not to discharge Shuman because of his conduct. And, it may be noted, had Shuman refused to perform his customary duties as the result of pressure by Machinists, this might well have constituted an unfair labor practice on the part of that organization: in that posture Shuman's conduct would not have come within the protection of Section 7 of the Act. See N. L. R. B. v. Rockaway News Supply Co., 197 F. 2d 111 (C. A. 2) affd. 345 U. S. 71. Unlike the cited decision, there was not a no-strike clause in the contract between Respondent and its collective-bargaining representative, Teamsters.

The Board has held, in a similar situation, that an employer may require its employee who is unwilling to cross a secondary picket line to elect whether to work or strike, but that it may not discharge him for engaging in this protected activity. Cyril DeCordova and Bro., 91 NLRB 1121. However, this concept was rejected both by the court of appeals and the Supreme Court in the later Rockaway News decision, supra, "as unrealistic and unfounded in law."

The DeCordova decision, by dictum, also placed reliance on the proviso to Section 8 (b) (4) which states that "... nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize

³Edward Ford, an official of Machinists, testified that he visited Snow at 1:30 p. m. on November 13 and asked him not to discharge Shuman for respecting the picket line, whereupon Snow stated that he had no use for labor organizations and that Shuman was of no use to him if he would not cross the line. Snow did not recall the conversation. I find that the conversation took place, although, as is apparent, it establishes only that Snow was consistent in his view of Shuman's conduct.

under this Act." The Board in effect held that the foregoing language could not logically be construed as being inapplicable to conduct under Section 8 (a) of the Act. I am unable to accept this dictum. The proviso is specifically a proviso to Section 8 (b) which proscribes certain conduct by a labor organization or its agents and nothing more. All the proviso stands for, therefore, is the proposition that the refusal by a person to enter the premises of an employer other than his own, under the indicated conditions, does not constitute an unfair labor practice by a labor organization.

This, in effect, was recognized by the Board in National Maritime Union of America, et al, 78 NLRB 971. The Board there stated, by dictum, that a holding that a strike was not violative of Section 8 (b) (1) (A) of the Act, (1) did not mean that the strike constituted a concerted activity protected by Section 7 of the Act, and (2) did not mean that a striker discharged because of participation in such a strike would be entitled to relief if charges were brought in his behalf alleging a violation of Section 8 (a) of the Act. See Seafarers' International Union, et al, 100 NLRB 1176.

That Congress intended in passing the amendments to the original Act to distinguish between the direct primary strike and so-called secondary activities, has been recognized by the courts ". . . Congress did not seek by Section 8 (b) (4) to interfere with the ordinary strike." N. L. R. B. v. International Rice Milling Co., Inc., 341 U. S. 665. The Court elsewhere held that "while Section 8 (b) (4) does not expressly mention 'primary' or 'secondary' disputes, strikes, or boycotts, that section often is referred to in the Act's legislative history as one of the Act's 'secondary boycott' sections. . . ."

The Supreme Court in the Rockaway decision recognized that the Section 8 (b) (4) proviso did not constitute a broad manifesto of basic nonwaivable rights. For it there stated that the proviso ". . . clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree. And nothing in the Act prevents their agreeing upon contrary provisions if they consider them appropriate to the particular kind of business involved. An employee's breach of such an agreement may be made grounds for his discharge without violating Section 7 of the Act. N. L. R. B. v. Sands Co., 306 U. S. 332. . . ." Stated otherwise, the decision holds that collective-bargaining contracts may, under this proviso, provide that employees will not be required to cross picket lines, presumably secondary, or that they may, in the alternative, provide that employees will be required to do so. I am constrained to find, therefore, in view of the foregoing, that the proviso may not be given the sweeping effect found in the DeCordova decision.

There is no question but that the conduct by the complainant did not involve his own conditions of employment. His action was motivated purely by his genuine sympathy for his union colleagues employed at other concerns in the area. And, on the other hand, I find that the conduct of Respondent did not result from an animus bias and was not motivated by hostility to Machinists.

The Supreme Court minority in the Rockaway decision flatly held that the conduct of the complainant herein was protected under Section 7 of the Act. The Court of Appeals for the Second Circuit treated with the basic issue in the Rockaway case independently of the no-strike provision in the collective-bargaining contract which covered the employees of that employer. That court accepted the contention of the Board that the refusal to cross the picket line was protected by Section 7 of the Act, but went on to state that this right was of no greater stature than the right of the employer to require the employee to perform "that part of his regular duties which requires him to cross the picket line. To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment which it is well settled he may not do." See Southern Steamship Co. v. N. L. R. B., 316 U. S. 31. The Supreme Court majority, while affirming the decision of the court of appeals in the Rockaway case, predicated its decision solely on the ground that the conduct of the employee there in question constituted a violation of the no-strike clause entered into between his employer and his collective-bargaining representative.

Both the Respondent in the present case and the court of appeals which decided the Rockaway case cite, in support of their decision, the decision in N. L. R. B. v. Illinois Bell Telephone Co., 189 F. 2d 124 (C. A. 7), cert. den. 342 U. S. 885. In that case 8 employees were demoted for refusing to cross picket lines at their own places of employment. These 8 were employed at various telephone exchanges and were represented by a labor organization other than the striking labor organization which, in turn, represented employees in other bargaining units of the same employer. The picket lines were established by this other labor organization and the 8 employees were demoted when they refused to cross these lines, it may be noted that the case arose under the original Act and, further, that a

majority of the group also held membership in the striking union. The court there stated that if the employees in question came within the protection of Section 7 of the Act, the finding of an unfair labor practice would be sustainable. It then proceeded to hold (1) that the activities were not concerted; (2) that a refusal to cross the picket lines was an act of principle and did not relate to their own grievances; and (3) assuming the activities to be concerted, they were not carried on for the purpose of collective bargaining or mutual aid or protection.

The knotty problem here posed is perhaps well described by the language of the Supreme Court in Allen-Bradley Co. v. Local Union No. 3, 325 U. S. 197. The Court stated, "We must determine here how far Congress intended activities under one of these policies (to preserve the rights of labor through the agency of collective bargaining) to neutralize the results envisaged by the other (to preserve competitive business economy)."

Although there is no direct evidence that the complainant herein was replaced, that would inevitably have been done, inasmuch as he was the only pickup man. And, since the Supreme Court majority in the Rockaway decision flatly rejected the Board's distinction between "discharge and replacement in this context," as "unrealistic and unfounded in law" it follows that Respondent, as a result, was within his legal rights in discharging the complainant for refusing to fully perform his job. As a result, in this context and in the absence of any antiunion bias or motive, Respondent had the alternatives of tolerating this demonstration of sympathy by the complainant or of treating it as a refusal on his part to perform the normal duties of his position. This employer chose to treat it as the latter, as insubordination, and in effect as an attempt to dictate the terms of his employment.

In view of the foregoing, and under all the circumstances present herein, I am persuaded and find (1) that the complainant herein was not engaged in a concerted activity for the purpose of collective bargaining or other mutual aid or protection, and (2) that in any event, assuming these activities to have been protected under the Act, Respondent did not commit an unfair labor practice by discharging this employee for refusing to perform his normal duties. I will accordingly recommend that the complaint be dismissed in its entirety. See N. L. R. B. v. Montgomery Ward and Co., 157 F. 2d 486 (C. A. 8) and Elk Lumber Co., 91 NLRB 333.

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

CONCLUSIONS OF LAW

1. The operations of Respondent affect commerce within the meaning of Section 2 (6) and (7) of the Act.
2. Respondent has not engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

[Recommendations omitted from publication.]

KWIKSET LOCKS, INC. *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, Petitioner

KWIKSET LOCKS, INC. *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, Petitioner. Cases Nos. 21-RC-3225 and 21-RC-3283. November 30, 1953

DECISION, ORDER, AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 9 (c) of the National Labor Relations Act, hearings were held before L. A. Gordon,