

warrant setting the election aside. In his report on objections the Regional Director attributed to the Employer an allegation not made in its formal objections, to the effect that the union representatives made it impossible for vehicles to pass them by without hitting them. Without deciding whether this additional objection was properly considered by the Regional Director, we find that it also is without merit.

Accordingly, the Employer's exceptions to the report on objections are hereby overruled. As the tally of ballots shows a majority of the ballots were cast for the Union, we shall certify that labor organization as the collective-bargaining representative of the employees in the appropriate unit.

[The Board certified Local 4876, United Steelworkers of America, CIO, as the selected collective-bargaining representative of the employees of West Coast Loading Corporation, in the appropriate unit described in the Board's Decision and Direction of Election.]

MEMBERS MURDOCK and RODGERS took no part in the consideration of the above Supplemental Decision and Certification of Representatives.

ADKINS TRANSFER COMPANY, INC. *and* TEAMSTERS, CHAUFFEURS, HELPERS AND TAXICAB DRIVERS LOCAL UNION #327, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL. *Case No. 10-CA-1867. August 23, 1954*

Decision and Order

On April 15, 1954, Trial Examiner Herbert Silberman issued his Intermediate Report in the above-entitled proceeding, finding, as is set forth in the copy of the Intermediate Report attached hereto, that the Respondent had not engaged in and was not engaging in the unfair labor practices charged to it in the complaint and recommending that the complaint be dismissed. 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 briefs, and the entire record in this case, and hereby adopts the findings of fact made by the Trial Examiner, except as noted below. However, for the reasons hereafter indicated, the Board rejects in their entirety the recommendations of the Trial Examiner and so much of his conclusions as go to the substantive unfair labor practice allegations of the complaint.

The Unfair Labor Practices

As is noted in the Intermediate Report, the essential facts in this case are not in dispute. William B. Elkins, Jr., and Thomas W. James, Jr., joined the Union on November 13, 1953. On November 16 and on November 20, the Union's business agent met with the Respondent's president, as the representative of these employees, and presented, on their behalf, a request for an increase in wages, and for other changes in working conditions. The Respondent's president stated he would consider the Union's request, and would meet with the Union's agent again on November 24. Instead, on November 21, the Respondent's president directed his supervisory agent to discharge Elkins and James. Such discharge action was effected that day with the explanation that "Mr. Adkins [the Respondent's president] was going to close the shop [i. e. the garage where James and Elkins were working] because he wasn't going to pay the union scale."

These objective facts, establish, in our view, a *prima facie* case supporting the General Counsel's position that the dismissal of the two employees was violative of Section 8 (a) (3) and (1) of the Act. For it clearly appears that the affected employees would not have so summarily been dismissed if they had not joined the Union and had not sought, through the Union, to exercise the rights incident to union membership.

We do not believe that the Respondent sustained its burden of dispelling the inferences fairly to be drawn from these facts. For its claim that its dismissal action represented an attempt to resolve an "economically difficult" position in which it had been placed by the Union is supported by nothing more than its subjective anticipation of what the Union *might* do, rather than upon what the Union actually *did* do, in its representation of these employees. Thus, the Respondent precipitately effected the dismissal of these two employees while the substance of the Union's demands was still in its earliest discussion stage and without giving any serious consideration to the possibility that the Union might compromise its substantive demands in the light of the Respondent's position that they were not economically feasible. By this precipitate dismissal action the Respondent, in fact, preempted the area of bargaining. In these circumstances, and in the absence of any evidence that the Respondent had been threatened with strike activity, we are unable to regard as factually valid, the Respondent's contention that it resorted to the elimination of the jobs of these employees because it had "no practical alternative" available to it,¹ or to test the legal issue the Respondent thereby seeks

¹ The General Counsel points out in its brief in support of the exceptions that "there is no reason shown why Respondent could not have bargained for a wage scale lower than that proposed by the Union, and in the event of an impasse Respondent could have con-

to present. Any other view on a record such as this would, we believe, provide to employers a ready means for frustrating the organizational rights the Act guarantees to employees.²

In so ruling, we are mindful of the Respondent's argument in effect, that its dismissal of these employees represented only an exercise of its managerial prerogative to discontinue operations if it chose, and that we are without power to "interfere" with its business judgment. There is, of course, merit to the idea that an employer cannot be compelled to do business against his will. The instant case, however, does not seem to us to present the kind of situation involving consideration of such theory. The Respondent is still operating its business in substantially the same form as it was prior to the dismissal of Elkins and James. As is undisputed, it still requires services of the kind which Elkins and James previously performed. Thus, the record shows that the maintenance work on the Respondent's vehicles is presently done in part by employees in other parts of the Respondent's Nashville operations, and in part, on a job-by-job basis by independent business concerns. Although the Respondent's president testified that he now finds this method of having its maintenance work done to be less costly, no evidence was adduced to establish what the differences in cost actually were. While the economic desirability of the present system of operation is pertinent to the framing of the remedy, we do not deem it material to the basic issue of whether the Respondent's November 21, 1953, dismissal of Elkins and James was discriminatory.

We find, in accord with the foregoing, that by dismissing William B. Elkins, Jr., and Thomas W. James, Jr., on November 21, 1953, the Respondent violated Section 8 (a) (3) and (1) of the Act.

The Remedy

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

In determining what affirmative action will best effectuate the policies of the Act, there are several factors to be considered. An order directing complete restoration to the *status quo* existing prior to the events here placed in issue would, in effect, require the Respondent to give up a system of operation which it apparently now finds feasible

tinued to pay the prevailing wages or could have granted any increase previously declined by the Union" See *Crompton Highland Mills*, 337 U. S. 217. The General Counsel also notes that the Respondent's argument (that failure to grant the Union demands would have resulted in a strike affecting its drivers and other employees) ignores the fact that the discharges, which it considered to be its only practical alternative, amounted to action most likely to result in a strike of the kind it alleged feared.

² Compare *Tennessee-Carolina Transportation Co.*, 108 NLRB 1369.

for nondiscriminatory reasons.³ Avoidance of this result without undue prejudice to the remedial rights of the employees affected by the Respondent's November 21, 1953, action, appears possible however, in view of the fact that the character of the Respondent's Nashville operations as a whole is such that there are apparently many kinds of substantially equivalent job classifications other than those previously filled by Elkins and James which these two employees may be qualified to fill. In these circumstances, we shall require the Respondent to offer Elkins and James immediate and full reinstatement in any portion of its Nashville operations where it may have substantially equivalent jobs these employees are qualified to perform, without prejudice to their seniority or to any other rights and privileges. If there is not sufficient employment immediately available for Elkins and James, the Respondent shall place them on a preferential hiring list for any position for which they are qualified, and shall offer them employment before any other persons are hired for such work.⁴

We shall order the Respondent to make Elkins and James whole for any loss of pay they may have suffered by reason of the Respondent's discrimination, by payment to each of them of a sum of money equal to that each normally would have earned as wages from the date of the discrimination to the date of the Respondent's compliance with the reinstatement provisions of this order, excluding from the period of computation the period of time beginning with the date of the Intermediate Report and ending with the date of this Decision and Order. Determination of the amount of back pay due shall be based on a quarterly method of computation in the manner established by the Board in the *F. W. Woolworth Company* case.⁵

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, Adkins Transfer Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local Union #327, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, or in any other labor organization of its employees, by discriminating against its employees in any manner in regard to their hire or tenure of employment or any term or condition of their employment.

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

³ Cf. *Tennessee-Carolina Transportation Co.*, 108 NLRB 1369

⁴ Cf. *Wallick & Schwalm Corp.*, 95 NLRB 1262, 1265-1267; *Symms Grocer Co. and Idaho Wholesale Grocery Co.*, 109 NLRB 346.

⁵ 90 NLRB 289, 291-294.

labor organizations, to join or assist the above-named 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.⁶

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

(a) Offer William B. Elkins, Jr., and Thomas W. James, Jr., immediate and full reinstatement in the Nashville, Tennessee, operations to any position each may be qualified to fill without prejudice to their seniority or other rights and privileges, and make those employees whole for any loss of pay suffered, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its Nashville terminal copies of the notices, attached hereto and marked "Appendix."⁷ Copies of said notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted.

(c) Upon request make available to the Board and its agents, for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due.

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

⁶ Because the Respondent's violation here goes to the heart of the Act, we regard a broad cease and desist order necessary.

⁷ 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."

Appendix

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, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership of our employees in Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local

Union #327, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, or any other labor organization by discharging any of them, or by discriminating in any other manner in regard to their hire and tenure of employment, or any term or condition of employment.

WE WILL offer William B. Elkins, Jr., and Thomas W. James, Jr., immediate and full reinstatement to any position each may be qualified to fill, without prejudice to any seniority or other rights and privileges previously enjoyed.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist the above-named 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 such activities except to the extent that such rights 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.

All our employees are free to join, form, or assist any labor organization, and to engage in any self-organization or other concerted activities for the purposes of collective bargaining or other mutual aid or protection or to refrain from such activities except to the extent that such right is affected by an agreement made in conformity with Section 8 (a) (3) of the Act.

ADKINS TRANSFER COMPANY, INC.,
Employer.

Dated_____ By_____

(Representative)

(Title)

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

Intermediate Report

STATEMENT OF THE CASE

Upon a charge duly filed by Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local Union #327, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for the Tenth Region (Atlanta, Georgia), issued a complaint, dated January 22, 1954, against the Respondent, Adkins Transfer Company, Inc., alleging that the Respondent by discharging William B. Elkins, Jr., and Thomas W. James, Jr., on November 21, 1953, and thereafter failing and refusing to reinstate them, had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. Copies of the charge,

complaint, and notice of hearing were duly served upon the parties. The Respondent in its amended answer denied that it committed the alleged unfair labor practices.

Pursuant to notice, a hearing was held on March 9, 1954, at Nashville, Tennessee, before Herbert Silberman, the undersigned Trial Examiner. The General Counsel and the Respondent were represented by counsel, and the Union by an official representative. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues was afforded all parties. At the conclusion of the General Counsel's case, Respondent made a motion to dismiss the complaint. Decision on this motion was reserved and it is now disposed of in accordance with the findings of fact and conclusions of law made below. All parties were granted opportunity to present oral argument and to file briefs and proposed findings and conclusions with the undersigned. Briefs were received from the General Counsel and the Respondent.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, an Indiana corporation, is a common carrier engaged in the transportation of freight by motor vehicles. The Respondent operates between Nashville, Tennessee, and Chicago, Illinois, principally, and maintains terminals at Indianapolis and Evansville, Indiana, as well as at Chicago and Nashville. During all times material herein, the dollar volume of Respondent's annual business was in excess of \$1,000,000. The Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local Union #327, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The essential facts in this case are not in dispute. Respondent is a common carrier engaged in the transport of freight by motor vehicles. During the times involved herein there were contracts in effect between the Respondent and the Union covering Respondent's pickup and delivery men and over-the-road drivers. These contracts, including their wage rate provisions, were identical with similar agreements between other trucking companies in the areas in which the Respondent operates and the Union. Respondent's relations with the Union has been amicable. With the exception of the two individuals named in the complaint all Respondent's operating employees appear to have been represented by the Union.

William B. Elkins, Jr., and Thomas W. James, Jr., were hired by Respondent in August 1953, as a mechanic and a mechanic's helper, respectively, and were Respondent's only maintenance employees at its Nashville, Tennessee, terminal. They applied for membership in the Union and designated the Union as their collective-bargaining representative about November 13, 1953, at which time they were being paid at the rate of \$1.25 and \$0.75 per hour, respectively. Upon the basis of the designations by Elkins and James, the Union attempted to secure substantial wage increases for these employees. Two meetings were held, one about November 16 and the other on November 20, 1953, between L. P. Herd, assistant business agent for the Union, and Howard Adkins, Respondent's president. At these meetings, Herd presented Adkins with copies of the Union's uniform contracts covering mechanics and servicemen. Herd pointed out the scale of pay for Elkins and James under the terms of these uniform contracts, which called for \$1.75 per hour for Elkins, an increase of \$0.50, and between \$1.25 and \$1.40 for James, an increase of \$0.50 or more. A third meeting was set for November 24. This meeting was not held because, in the meantime, on November 21, Respondent discharged the two employees.

Elkins testified that when he was discharged on November 21, 1953, he was told by his supervisor, Robert E. Lee, that "Mr. Adkins was going to close the shop because he wasn't going to pay the union scale." This was not denied. Howard Adkins testified credibly that based upon his experience in dealing with the Union

he was of the opinion that if Respondent continued its maintenance department at Nashville, Tennessee, unless it raised the wages of Elkins and James to meet the Union's scale, a strike would ensue which would effectively close Respondent's entire business operations. The accuracy of Adkins' opinion is borne out by Herd, who testified that he knew of no instance where the Union permitted a contracting employer to pay union members different wage rates than are provided for in the Union's uniform, industry agreements for the particular employee classifications. Therefore, rather than capitulate to the Union's demands and increase the wages for Elkins and James to the union scale which he considered economically disadvantageous for the Respondent,¹ Adkins decided to discontinue the maintenance department² and to discharge the two maintenance employees.

Adkins further testified that the fact that Elkins and James joined the Union did not motivate their discharge. This is corroborated by the fact that the Respondent has not attempted to replace these two former employees directly or indirectly with nonunion personnel.

This is not a case where an employer who is generally hostile towards unions and opposes employee organization seeks to defeat his employees' efforts to engage in collective bargaining by discontinuing a department in which a majority of the employees have selected a collective-bargaining representative. Compare: *The Houston Chronicle Publishing Company*, 101 NLRB 1208; *Williams Motor Company*, 31 NLRB 715, enfd., 128 F. 2d 960 (C. A. 8). In this regard, it is significant that the complaint does not charge that the Respondent has refused to bargain in good faith with the Union. Here, the Respondent had only two practical choices, either to pay its maintenance employees the wage rates demanded by the Union, or discontinue its maintenance department. No area for bargaining with the Union existed.³ In this circumstance, Respondent has committed no unfair labor practice by choosing to discontinue its maintenance department and to discharge its two maintenance employees, especially in the absence of evidence of other unfair labor practices or animus towards the Union on the part of the Respondent. I find, therefore, that Respondent did not discharge Elkins and James to encourage or discourage membership in any labor organization, in violation of Section 8 (a) (1) and (3) of the Act.

CONCLUSION OF LAW

Respondent has not engaged in any unfair labor practices within the meaning of the Act.

[Recommendations omitted from publication.]

¹ Adkins testified that since Respondent closed its maintenance department and discharged Elkins and James, most of the work previously performed by these two employees has been performed by various automotive repair and service agencies, and the remaining work previously performed by these two individuals has been performed by other employees of the Respondent who are members of the Union. Also, Respondent's maintenance costs under its present arrangement are not only less than they would be if Elkins and James were retained and paid the union wage scale, but are less than they were before the Respondent discontinued its maintenance department when Elkins and James were being paid substantially below the union scale. However, Respondent submitted no evidence, such as figures showing comparative costs, to corroborate Adkins' testimony.

² Adkins testified that Respondent has no present intention of reopening its maintenance department at Nashville, Tennessee.

³ In this regard, Herd testified, as follows:

Q. Now, if Mr. Adkins had kept his maintenance, kept open, but declined to sign your contract, what would you have done?

A. In regard to what?

Q. If he just refused to sign the mechanic's and service man's contracts, but kept his service going. You would call a strike against him, wouldn't you?

A. I think that is the procedure.

Q. Mr. Herd,—if you called a strike against a trucking company where you represent his dockmen and his over-the-road men, it is pretty effective, is it not?

A. I don't know.

Q. It results in one hundred percent close down of that company, does it not?

A. It has happened

Q. Well, it usually does, as a matter of fact.

A. Yes, sir.