

In the Matter of MAX SAX AND RHODA SAX, CO-PARTNERS, DOING BUSINESS AS CONSOLIDATED MANUFACTURING COMPANY and PLAYTHINGS, JEWELRY & NOVELTY WORKERS INTERNATIONAL UNION—CIO

Case No. 13-C-2825.—Decided June 17, 1947

Mr. Herman J. De Koven, for the Board.

Seyfarth, Shaw & Fairweather, by *Messrs. Henry E. Seyfarth* and *Robert W. MacDonald*, of Chicago, Ill., for the respondents.

Messrs. Walter Ignatowicz, Henry J. Henry, of Chicago, Ill., and *Messrs. Rothbard, Harris & Oxfeld*, by *Mr. Sidney Birnbaum*, of Newark, N. J., for the Union.

Mr. William J. Avrutis, of counsel to the Board.

DECISION

AND

ORDER

On October 30, 1946, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that the respondents had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Union and counsel for the Board filed exceptions to the Intermediate Report. A supporting brief was filed by counsel for the Board, and the respondents also filed a brief. On May 21, 1947, the Board at Washington, D. C., heard oral argument in which the respondents and the Union participated.

The Board has reviewed the rulings of the Trial Examiner 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 the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the complaint issued herein against the

respondents, Max Sax and Rhoda Sax, co-partners, doing business as Consolidated Manufacturing Company, be, and it hereby is, dismissed.

CHAIRMAN HERZOG took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT

Mr. Herman J. De Koven, for the Board.

Seyfarth, Shaw & Fairweather, by Messrs. *Henry E. Seyfarth* and *Robert W. MacDonald*, of Chicago, Ill., for the respondents.

Messrs. Walter Ignatowicz and *Henry J. Henry*, of Chicago, Ill., for the Union.

STATEMENT OF THE CASE

Upon a first amended charge duly filed on July 31, 1946,¹ by Playthings, Jewelry & Novelty Workers International Union—CIO, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Thirteenth Region (Chicago, Illinois), issued its complaint dated August 6, 1946, against Max Sax and Rhoda Sax, co-partners, doing business as Consolidated Manufacturing Company,² herein called respondents, alleging that respondents had engaged and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint accompanied by notice of hearing were duly served upon respondents and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that respondents: (1) on or about March 11, 1946, discharged Son Seals, and thereafter refused to reinstate him because of his union membership and activities; (2) since on or about March 11, 1946, advised and warned their employees against joining or engaging in activities on behalf of the Union, questioned their employees concerning their union affiliation and activities, and urged their employees to report to respondents concerning the union activities of other employees; and (3) by such conduct engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

Respondents filed an answer in which they admitted the allegations in the complaint with respect to their business operations, admitted that Son Seals was discharged on or about March 11, 1946, denied the commission of any unfair labor practices, and moved that the complaint be dismissed.

Pursuant to notice, a hearing was held from August 26 to August 29, 1946, at Chicago, Illinois, before the undersigned, Martin S. Bennett, the Trial Examiner duly designated by the Chief Trial Examiner. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded all parties. At the commencement of the hearing, the undersigned denied the motion to dismiss the complaint contained in respondents' answer. At the close of the hearing the undersigned denied a motion by respondents to strike the testimony of certain witnesses, and granted a motion of counsel for the Board to conform the pleadings to the proof with respect to formal matters. The undersigned reserved ruling upon respondents' motion, at the conclusion of the hearing, that the complaint be dismissed. This motion is disposed of hereinafter. The parties were afforded an opportunity to file

¹ The original charge was filed on March 14, 1946.

² The name of respondents was so amended at the hearing, without objection, upon the motion of the Trial Examiner.

briefs with the undersigned, and briefs have been received from respondents and from counsel for the Board.

Respondents moved orally, prior to the close of the hearing, and also by written motions filed with the undersigned on September 7 and 11, 1946, after the close of the hearing, to take the testimony by deposition on certain issues of three witnesses who were unavailable on the dates of the instant hearing. On September 13 and 19, 1946, the undersigned issued an Order and Supplemental Order, respectively, for the taking of said testimony by deposition. The depositions have been received.

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 RESPONDENTS

Max Sax and Rhoda Sax, co-partners, are doing business under the trade name and style of Consolidated Manufacturing Company, with their principal office and place of business at Chicago, Illinois, where they are engaged in the manufacture and sale of punch boards. Respondents, in the course and conduct of their business, annually purchase raw materials valued in excess of \$50,000, of which amount more than 50 percent is shipped to the plant from States other than the State of Illinois. The finished products annually manufactured and distributed by respondents are valued in excess of \$100,000, of which amount more than 75 percent is shipped to States other than the State of Illinois.

II. THE ORGANIZATION INVOLVED

Playthings, Jewelry & Novelty Workers International Union, affiliated with the Congress of Industrial Organizations, is a labor organization which admits employees of respondents to membership.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The discharge of Son Seals*

1. Work record

Son Seals commenced his employment with respondents in August 1945, as a punch press operator at 60 cents per hour. At the time of employment, he was promised a future wage increase by Leonard Barney, foreman of the punch press department. He requested and received an individual wage increase of \$.05 per hour in November or December 1945, and \$.025 in January 1946. Certain incidents which took place with respect to the performance of his duties during January and February of 1946 will be discussed hereinafter.

Seals did not report for work on March 6, 1946 and was absent for four successive work days through March 9.³ He reported for work on Monday, March 11, and was discharged by Foreman Barney that afternoon. He has not since returned to work for respondents, nor, insofar as the record indicates, has he ever made application for reinstatement.

2. Seals' union activities and discharge

On or about February 25, 1946, Seals met union representatives Walter Ignatowicz and Henry J. Henry, and agreed to distribute union literature among respondents' employees. He was given 50 to 75 cards to pass out.⁴ According

³ The fourth day, March 9, was Saturday and a full workday. The plant is closed on Sunday.

⁴ Ignatowicz so testified.

to Seals, on February 26, 1946, he solicited the membership of 17 employees outside the plant before and after working hours, and obtained 7 signed applications for membership in the Union.⁵ There is no evidence that this activity by Seals came to the attention of respondents, nor does the record disclose any union activity by Seals between February 26 and March 5. Seals became ill on the evening of March 5, after returning from work, and, as noted above, was absent from work between March 6 and 9.⁶

According to Seals, he appeared at the plant on March 11 at approximately 7:30 a. m., but did not punch his time card until 8 a. m., the usual punch-in time. During the 30 minutes prior to 8 o'clock, he distributed 27 union application cards among employees of the gluing and finishing departments and also solicited the membership of 10 other employees who refused to accept cards. Seals was unable to name any of these employees. He testified that on 2 separate occasions during this 30-minute period, Assistant General Manager Arnold Sax entered the factory area where Seals was engaged in solicitation for the Union; passed within several feet of Seals and stared at the union cards in Seals' hand; inspected merchandise for several minutes in the vicinity of Seals; and on each occasion returned to his office, passing within several feet of Seals. At 8 o'clock, Seals placed the cards in a rear pocket of his trousers and began work.

Seals further testified that at about 10 a. m. that day, after being warned by Employee Matthew Gault to be careful, and noticing that several employees were staring at him, he turned around and discovered that Sax and Foreman Barney were standing in back of him and were bent over in an effort to read the cards projecting from his trousers pocket. He asked what they were looking at and whether they wanted a card. They made no reply but walked away and Seals then resumed his work.

During the 12 to 12:30 lunch period that day, according to Seals, he resumed his solicitation and spoke to 35 employees in the gluing and filling departments, 10 of whom accepted cards. He was unable to identify any of this group. He testified that shortly after he commenced his activities, Assistant General Manager Sax entered the room and inspected some stock, passing within 3 feet of Seals; that Sax remained there for about 10 minutes, observing Seals during part of this time, and then departed. Shortly thereafter, during the lunch period, Foreman Barney went over to a crimping machine located approximately 10 feet from where Seals was standing. According to Seals, Barney remained at this machine for approximately 20 minutes and looked at Seals on a number of occasions while Seals was discussing the Union and displaying application cards to the employees. Seals' testimony is silent as to any conversation between Barney and himself on this occasion.

The normal workday in the plant ended at 4:30 p. m., although Seals usually worked overtime until 6:30. At 4:45 that day, according to Seals, Barney approached him and stated, "I heard that you [were] passing out union cards and teaching union here—if you [are], you are immediately fired" Seals testified that he admitted his union activities to Barney, that he stopped to wash up, and that Barney then took him to a plant office where Sax attempted to pay Seals off in cash.⁷ Seals refused to take the cash or to sign a receipt for the money and left.

⁵ The record does not indicate exactly where this activity took place.

⁶ On the evening of March 6, Seals met the union representatives at his home and decided to solicit for the Union in the plant during nonworking hours.

⁷ The plant work period commenced on Wednesday morning and lasted 14 days through Tuesday evening. The employees were customarily paid by check on the Friday after the close of the work period.

Testimony in support of Seals' version of his union activities in the plant on March 11, and his surveillance by Barney and Sax was presented by a number of employees and former employees. Thus, Matthew Gault supported Seals' testimony with respect to the surveillance before work, at 10 a. m., and at noon on March 11, and Marzella Melton, Elijah Jones, Flossie Traylor, and Queen Jessup supported Seals' testimony concerning the incident at noon on March 11.⁸

3. Respondents' contentions and conclusions

Both Barney and Sax denied that they had any knowledge of Seals' union activities prior to the time of his discharge.⁹ They further denied that they had observed Seals soliciting for the Union or distributing union cards, or that Seals was discharged because of his union activities. It is respondents' contention that Seals was discharged on March 11, 1946, because he was an inefficient employee who was negligent in the performance of his duties, and because he had failed to give respondents notice of his inability to report for work on March 6, as required by a company rule. Thus, Barney testified that in discharging Seals on March 11, he called attention to Seals' failure to report his absence and negligent performance of his duties, and that he made no statement concerning Seals' union activities, as claimed by Seals.

With respect to the existence of a rule requiring the reporting of absences, it is clear that since on or about May 1945, a notice was posted on the plant bulletin board, instructing employees to notify the company on the morning of an absence, upon penalty of discharge. The bulletin board was the only one in the plant and was located directly above the time clock which all employees were required to punch. Occasionally a notice would be torn down by an employee, but another would be put up in its place by Charlotte Zima, a supervisory employee in charge of respondents' pay-roll department and records. As of the date of the instant hearing, the notice still appeared on the bulletin board in substantially its original form, although some minor variations in language did appear in replacement notices.¹⁰

The record also shows that in the 2-year period prior to the instant hearing, respondents had discharged a number of employees for absenteeism, as well as for inefficiency, and both. Respondents also had a policy that an unexplained absence of more than 3 days rendered one subject to discharge, although the policy was apparently relaxed upon occasions, according to the replaceability of the worker and because of conditions in a particular department.¹¹

⁸ Employee James Mallette, who reports for work at 5 p. m., testified that a "matter of days" after Seals' discharge he overheard Barney tell the setter Marnell that someone would be fired, as Seals had been, because of the Union. He was unable to fix the date of this conversation which, according to Barney and Marnell, did not take place. Mallette was a vague and unconvincing witness and the undersigned does not accept his testimony.

⁹ Barney admitted that he first learned of union activities in the plant several days after Seals' discharge, when an employee placed a union pamphlet in his pocket. According to Sax, on March 12, Barney informed him that he, Barney, had been told that Seals was distributing leaflets.

¹⁰ Findings herein are based upon the clear and forthright testimony of Charlotte Zima, as supported by the testimony of three office employees of respondents, Goodman, Pytlík, and Kaplan, by the testimony of Barney and Sax, and by the testimony of former office Employee Tiso. All of the above were convincing and forthright witnesses and their testimony was supported by the depositions of former office Employees Desmond and Dado. The undersigned rejects the testimony of Seals and Melton that no notice was posted, as well as that of Jessup, Traylor, and Mallette that no notice was posted until after Seals' discharge.

¹¹ This finding is based upon the credible testimony of Arnold Sax.

Although Seals denied that any notice was posted in the plant concerning the reporting of absences, he claimed that he notified Barney on March 5 that he might not be at work on March 6 because of illness. In addition, Seals testified that three telephone calls were made in his presence on the morning of March 6 within one hour, to notify Barney that Seals would be absent. On the first of these calls, which was made by his wife, according to Seals, an office girl answered, replied that Barney was not available, and promised to notify Barney that Seals was ill. Notwithstanding, a second and a third call were made at short intervals by Seals' wife and cousin, respectively, with the identical result. Barney denied that Seals had informed him of an intended absence on March 5, or that he had received any telephone message on March 6 concerning Seals' sickness. The undersigned credits Barney's testimony.¹²

With respect to the contention of respondents that Seals was an inefficient employee, the record indicates that after his wage increase in January 1946, Seals' work was such as to merit criticism from Barney on many occasions. On or about February 1 and 20, Seals spoiled two large jobs through inadvertence. He was also frequently absent from his machine and it was necessary for Barney to search for Seals in the plant and instruct him to return to his machine. His spoilage rate on punches was consistently high, and, contrary to Seals' contentions, he was not complimented on his work by Barney.¹³

Conclusions

As set forth above, the record supports respondents' contentions that Seals was discharged because of inefficiency and inattention to his duties, as well as his failure to report his absence of 4 days. Moreover, the undersigned has previously rejected the testimony of Seals that no notice appeared on the plant bulletin board concerning the reporting of absence, and Seals' testimony was found to be otherwise unreliable. Although he testified in minute detail concerning the various alleged acts of surveillance by Barney and Sax on March 11, and gave the exact number of people he spoke to, the exact number of cards he distributed, and the exact number of those who refused cards on each occasion, as heretofore set forth, he was unable to name a single employee with whom he had discussed the Union that day. Furthermore, the testimony of witnesses who testified in support of Seals, that he had been under surveillance on March 11, was demonstrated to be unreliable and is rejected.¹⁴

¹² Barney's testimony is supported by that of the office employees then in respondents' employ, Kaplan, Pytlík, Tiso, and Goodman, heretofore found to be credible witnesses, and Desmond and Dado, whose testimony was taken by deposition, all of whom testified that they had no recollection of taking a telephone message concerning Seals' illness on March 6, 1946. The undersigned was unfavorably impressed by the implausibility of Seals' testimony that his illness was reported to respondents on March 6 on three separate occasions within one hour, despite his insistence that no rule existed which required such reporting.

¹³ These findings are based upon the credible testimony of Barney, diecutter Marnell, who inspected Seals' work, and upon the forthright testimony of Curtis Wright and Joe Schissel who were punch-press operators employed on machines adjoining Seals' machine. The undersigned rejects Seals' testimony that he was the fastest worker in the plant, that he was complimented by Barney on his work and that he was assigned rush jobs, as well as the testimony of several employees in other departments of the plant, who occasionally passed Seals' machine, that he was as capable and as rapid an operator as the other punch-press operators.

¹⁴ As noted above, Gault, Melton, Jessup, Jones and Traylor each testified that Seals was under surveillance on March 11 between noon and 12:30 p. m. The time cards for Jessup and Jones for that day were introduced in evidence and showed that Jessup had punched out at 11:21 a. m and performed no further work that day, and that Jones did not work at all on March 11. Jessup was recalled to the stand and testified that she took ill and punched out at 11:21 a. m.; remained in the ladies' room until noon, and then

Although the question is not free from doubt, the undersigned concludes and finds from the entire record, that the allegations of the complaint with respect to Seals' discharge have not been sustained.

B. Interference, restraint, and coercion

Testimony was offered in support of this allegation by Merzella Melton, Queen Jessup, and Angeline Williams, who testified concerning statements allegedly made to them by Foreman Barney on various occasions after the discharge of Seals.

Melton testified that on the day after Seals' discharge, Barney asked her if she had received a card from Seals on the previous day. According to her, this statement was made in the presence of her co-workers, Lena Wilson and Martha Adams, who heard it. Wilson and Adams, however, denied that such a statement was ever made in their presence.

Queen Jessup testified that commencing the day after Seals' discharge and through approximately April 3, 1946, Barney discussed the Union with her on four occasions. On the first occasion, the day after Seals' discharge, Barney asked her if she had obtained a union card and if she knew the names of any employees who had signed cards. Approximately a few days later, Barney asked her if she had seen Seals distributing union cards outside the plant.¹⁵ On the third occasion, Barney told her that he would discharge anyone who signed a union card. Finally, on or about April 3, Barney asked her if she had attended a union meeting and who was present. Her testimony was supported as to the third incident by that of Traylor, who testified that Jessup informed her of Barney's statement. The testimony of both Traylor and Jessup has, however, been heretofore rejected.

Angeline Williams testified that Barney spoke to her about the Union on three occasions. On the first, several days after Seals' discharge, he asked whether she had obtained union cards from Seals. Several weeks later, he asked whether she had attended a union meeting, and finally, on a later occasion, he asked Williams whether she had received a letter from the Union. According to Barney, about one week after Seals was discharged, Williams approached him, told him that union leaflets were being distributed in the street outside the plant, and asked him whether he desired to have one. Barney

returned to the plant and ate her lunch; observed the surveillance of Seals and then, still feeling ill, left for the day. Jones was recalled to the stand and testified that he actually worked the entire day of March 11. He claimed that he had been absent for approximately 2 weeks prior to March 11; that his time card was not in the rack when he reported for work on March 11; that he did not report this to anyone as he felt that his absence was unwarranted, and that he never put in a claim for payment for his work on March 11. The undersigned does not credit the testimony of Jones and Jessup.

Gault alleged that he noticed Seals distributing cards at noon on March 11, as he, Gault, was distributing cards with him. He claimed that Seals had given him whatever cards he had on the 11th. Seals, however, claimed that he was unaware that Gault had distributed cards on the 11th. In addition, respondents introduced in evidence a certified copy of a conviction of Gault in the Cook County Criminal Court at Chicago on May 17, 1943, for burglary, for which he was sentenced to a term of one year to life. Gault, who had testified prior to the introduction of this exhibit, was not recalled to the stand. In view of the above, his testimony is rejected.

Traylor testified that she was present on March 11, that she saw Jones at work that day, that no notice appeared on the plant bulletin board instructing the employees to notify the plant when absent until after Seals' discharge on March 11. Jones' testimony that he was at work on March 11 having been rejected, and it having been found that a notice was posted since on or about May 1945, the undersigned rejects Traylor's testimony. Melton's testimony that no notice ever appeared on the bulletin board has been heretofore rejected.

¹⁵ Seals, after his discharge, continued to solicit for the Union outside the plant.

replied, "That is up to you," and on the following day, Williams handed him a leaflet. He denied that he discussed the Union with Williams on any other occasion.

As found above, the testimony of the Board witnesses herein was flatly and credibly controverted or was found to be unreliable. Barney had been heretofore found a reliable witness and the undersigned is also of the opinion that his version of the conversation with Williams is the more reliable. In view of the above, and in this state of the record, although the question is not free from doubt, the undersigned concludes and finds that the evidence does not sustain the allegations of the complaint herein.

CONCLUSIONS OF LAW

1. The operations of respondents, Max Sax and Rhoda Sax, co-partners, doing business as Consolidated Manufacturing Company, occur in commerce, within the meaning of Section 2 (6) and (7) of the Act.
2. Playthings, Jewelry & Novelty Workers International Union, CIO, is a labor organization within the meaning of Section 2 (5) of the Act.
3. Respondents have not engaged in unfair labor practices, as alleged in the complaint, within the meaning of Section 8 (1) and (3) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the complaint be dismissed.

As provided in Section 203.39 of the Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946, any party or counsel for the Board may, within fifteen (15) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.38 of said Rules and Regulations, file with the Board, Rochembeau Building, Washington 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof; and any party or counsel for the Board may, within the same period, file an original and four copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.65. As further provided in said Section 203.39, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

MARTIN S. BENNETT,
Trial Examiner.

Dated October 30, 1946.