

eral Counsel on appeal. Under these circumstances, the striking employees are economic strikers, subject to replacement at the will of the Employer. As the record discloses that all the employees on strike have been permanently replaced, we find that they are not eligible to vote in the elections directed herein.¹⁰

There is also evidence in the record that in the fall of 1952 and in the spring of 1953, the Employer, for economic reasons, laid off approximately 200 employees. At the time of the hearings the Employer had recalled or rehired approximately 15 to 20 of the 200 laid-off employees. It further appears that the Employer's present work force, numbering approximately 214 employees, is adequately handling its current production requirements and that the Employer anticipates no increase in the near future in the size of its present complement of employees. Under these circumstances, and in view of the fact that these laid-off employees have no reasonable expectation of employment in the near future, we find, in accord with our well-established policy, that they are not eligible to vote in the elections directed herein.

[Text of Direction of Elections omitted from publication.]

¹⁰ See *Times Square Stores Corporation*, 79 NLRB 361

THE GREAT ATLANTIC & PACIFIC TEA COMPANY (PITTSBURGH BAKERY) and CATHERINE KARDELL

BAKERY & CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL 12, A. F. L. and CATHERINE KARDELL. *Cases Nos. 6-CA-778 and 6-CB-209. November 18, 1954*

Decision and Order

Upon charges filed on September 22, 1953, and November 25, 1953, by Catherine Kardell, an individual, the General Counsel of the National Labor Relations Board, herein called the General Counsel, by the Regional Director for the Sixth Region (Pittsburgh, Pennsylvania), issued a consolidated complaint dated March 26, 1954, against Bakery & Confectionery Workers' International Union of America, Local 12, A. F. L., herein called the Union, and against The Great Atlantic & Pacific Tea Company (Pittsburgh Bakery), herein called the Company, alleging that the Respondents had engaged in and were engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (b) (1) (A) and (2), Section 8 (a) (3) and (1), and Section 2 (6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Copies of the charges and

complaint together with notice of hearing were duly served upon the Respondents and the Charging Party.

The complaint as amended alleged that the Company had discriminatorily discharged Catherine Kardell in violation of Section 8 (a) (3) and (1) of the Act, that the Union had caused the Company so to discriminate, thereby violating Section 8 (b) (2) and (1) (A) of the Act, and that the Union by the posting of a notice requiring members delinquent in their dues to pay certain fines as a condition of employment had independently violated Section 8 (b) (1) (A) of the Act. The Respondents filed answers denying the principal allegations of the complaint and asserting affirmatively that the discharge of Catherine Kardell was in pursuance of a lawful union-security provision in their collective-bargaining agreement.

Pursuant to notice, a consolidated hearing was held in Pittsburgh, Pennsylvania, on April 12, 1954, before C. W. Whittemore, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel, the Charging Party, and the Respondents were represented and participated in the hearing. All parties 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 General Counsel's case, the Respondents moved to dismiss the complaint. The Trial Examiner reserved ruling on the motions. At the close of the hearing, the parties waived oral argument, but subsequently the General Counsel filed a memorandum of law, the Company filed a brief, and the Charging Party submitted proposed findings of fact and conclusions of law. During the course of the hearing, and in his Intermediate Report, the Trial Examiner made rulings on other motions and on the admission of evidence. The Board has reviewed these rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.

On May 17, 1954, the Trial Examiner issued his Intermediate Report, copies of which were duly served upon the parties. In the Intermediate Report, the Trial Examiner found that the Respondents had not engaged in any unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2), and 8 (a) (3) and (1), respectively, of the Act, and recommended that the complaint be dismissed in its entirety.

Thereafter, the General Counsel and the Charging Party filed exceptions to the Intermediate Report and supporting briefs. The Company filed a brief in support of the Intermediate Report.

The Board has considered the Intermediate Report, the exceptions and brief, and the entire record, and, to the extent indicated hereinafter, finds the exceptions to have merit.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT COMPANY

The Great Atlantic & Pacific Tea Company is a New Jersey corporation engaged in the operation of retail food stores, bakeries, and food processing plants throughout the United States. As an integral part of its national bakery division, it operates the Pittsburgh Bakery, the one facility herein involved, at Pittsburgh, Pennsylvania.

During the past year, the Company sold and shipped bakery products valued at about \$1,500,000, of which total products valued at about \$450,000 were shipped to points outside the Commonwealth of Pennsylvania.

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

II. THE LABOR ORGANIZATION INVOLVED

Bakery & Confectionery Workers' International Union of America, Local 12, A. F. L., is a labor organization admitting to membership employees of the Respondent Company at its Pittsburgh Bakery.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Events*

The Respondents are parties to a collective-bargaining agreement which provides that "all employees shall maintain their union membership in good standing by the regular payment of dues and initiation fees as a condition of continued employment."

On August 17, 1953, the Union posted a notice on the bulletin board at the Company's plant reading as follows:

August 17, 1953.

To All Members of Local Union No. 12

Beginning with September no delinquent notices will be sent to members in arrears with their dues.

Dues that are not paid in the current month will be assessed one dollar (\$1.00) and any member owing two months dues must pay all dues and assessment on the 15th day of the second month.

Failure to pay all dues and assessment on or before the 15th day of the second month will result in being removed from the job.¹

¹ The Union's constitution provides that members must pay dues on or before the last day of the month, or they will be subject to a \$1 assessment. The constitution further provides that "if the delinquent dues plus the \$1 assessment are not paid on or before the 15th of the following month, such delinquent employees will then be removed from their jobs." The "Book of Laws" of the Union's International provides that "no dues shall be accepted by local unions unless all outstanding fines and assessments have since been paid in full by the employee."

Neither C. L. McGee, the bakery manager, nor G. R. Starkey, the Company's operating superintendent, had approved this particular notice, nor had they apparently seen it before posting.

On September 4, 1953, the Union posted another notice listing the names of 27 employees who owed dues for July or August 1953. This notice was intended to take the place of individual written delinquency notices which heretofore had been sent to delinquent members. The name of the Charging Party, Catherine Kardell, appeared on the list as owing dues for July 1953. However, Kardell did not see this notice and accordingly did not get in touch with the Union. On or about September 18, 1953, Joseph Sullivan, the Union's financial secretary, called Bakery Manager McGee by telephone and requested that 11 employees, including the Charging Party, be discharged because of dues delinquency. McGee, thereupon tried to contact all the delinquent employees to verify the delinquency claims. He spoke to Kardell the same day and told her of the Union's demand. She replied that she had dues stamps in her union book proving that she had paid her July and August dues. McGee asked to see the book, but she failed to show it to him. She was discharged the same day.

On the day following her discharge, Kardell took her book to the Union's office where she showed it to the union clerk, Betty Lewis. The book had stamps showing that she had paid her dues for July and August. Lewis asserted that the July and August dues had been paid by Ruth Kardell, Catherine Kardell's sister-in-law, and not by Catherine, and that the stamps had been entered in her book by mistake. Lewis thereupon removed the July and August stamps from Catherine's book.

There is no dispute that the Union requested Catherine Kardell's discharge because it believed that she was delinquent in her dues and that the Company complied with this request.

B. Contentions of the parties

The General Counsel contends that: (a) The Union independently violated Section 8 (b) (1) (A) of the Act in that it coercively made the payment of fines in addition to dues a condition of continued employment; (b) irrespective of whether Catherine Kardell paid her July and August dues, her discharge was unlawful because it was made under a union-security provision which had been rendered invalid by the August 17 notice, approved by the Company, making the payment of fines plus dues a condition of continued employment; and (c) in approving the posting of the August 17 notice, the Company had reasonable cause to believe that the Union was seeking Mrs. Kardell's discharge for reasons other than her failure to pay periodic dues. The Charging Party contends that she had in fact paid her July and August 1953 dues and that the contrary finding of the Trial

Examiner was based on hearsay evidence and unwarranted conjecture.² The Union denies that it intended to, or did in fact, make the payment of fines a condition of employment, or that it had requested the Charging Party's discharge for any reason other than her failure to pay the July and August 1953 dues. The Company asserts that it gave the Charging Party the opportunity to prove her paidup status in the Union, and that absent any attempt of such proof, it was justified in relying on the Union's assurance that the Charging Party was delinquent in her dues.

C. Conclusions

1. The August 17 notice

The August 17 notice posted by the Union clearly made the payment of assessments, imposed as a penalty for dues delinquency, a condition of continued employment. The Board, with court approval, has held in a number of cases³ that assessments and fines imposed for various reasons are not "periodic dues" within the meaning of the Act and that their imposition restrains and coerces employees in violation of Section 8 (b) (1) (A) of the Act. We do not agree with the Trial Examiner's reasoning, which he based on analogies to the penalties imposed by utilities for nonpayment of bills and to discounts allowed by commercial establishments for the prepayment of bills, that fines for dues delinquency are "part of the dues structure" and as such are "periodic dues" within the meaning of the Act. Such fines are intermittently imposed and by their very nature not "periodic." Their primary purpose is not to create revenue, but to provide punishment for nonpayment of dues on time. Accordingly, we find that, by unlawfully conditioning employment on the payment of assessments, the Union restrained and coerced employees in violation of Section 8 (b) (1) (A) of the Act.

2. The alleged amended union-security provision

The General Counsel concedes that the union-security clause in the existing collective-bargaining contract conditioning continued employment on the "regular payment of dues and initiation fees" is lawful. He contends, however, that the posting of the Union's unlawful notice of August 17 was made with the knowledge or consent of the Company, and that its effect was to modify the contract union-security

² Although the General Counsel did not specifically allege that Kardell had paid her union dues, he acquiesced in Kardell's contention to that effect and the subject was fully litigated at the hearing. We therefore consider that the issue of Kardell's payment of her dues is properly before the Board for decision.

³ *Westinghouse Electric Corporation*, 96 NLRB 522, enfd. *sub nom.*, *N. L. R. B. v. I. A. M. Local 504*, 203 F. 2d 173 (C. A. 9) (dual unionism); *Eclipse Lumber Company, Inc.*, 95 NLRB 464, enfd. 199 F. 2d 684 (C. A. 9), cert. denied 342 U. S. 870 (refusal to picket); *Electric Auto-Lite Company*, 92 NLRB 1073, enfd. 196 F. 2d 500 (C. A. 6), cert. denied 342 U. S. 823 (failure to attend union meetings).

provision by making employment contingent upon the payment of assessments as well as of dues. We do not agree that the August 17 notice, although unlawful, had the effect claimed by the General Counsel. Both McGee and Starkey, the Company's top plant officials, testified without contradiction that they were not aware of the August 17 notice and had not approved it. Neither is there any evidence that either official had authority to change any contract provision. In any event there is no ground for inferring that the Company had agreed to modify its lawful union-security provision in an unlawful manner. Accordingly, we reject the General Counsel's contention that the Company and the Union were parties to an unlawful union-security arrangement and that the discharge of Kardell therefore violated Section 8 (a) (3) and 8 (b) (2) of the Act.

3. Kardell's payment of her dues

The Charging Party contended, with the acquiescence of the General Counsel, that she had paid her July and August dues and that her discharge for alleged nonpayment was therefore unlawful.

It is undisputed that on September 18, 1953, the Charging Party had in her union book two dues stamps for July and August, which stamps under the International's "Book of Laws" constitute a valid—and the only valid—receipt for dues payment. Catherine Kardell testified that sometime during the first 2 weeks of July 1953, after getting married, she sent the required change of name form to the Union, together with her union book and four \$1 bills in payment of her dues for July and August. She explained that, although she frequently had been tardy with her dues, she then thought that she might as well pay her August dues in advance, as she had to send in her book anyway and the Union was cracking down on Union members after a recent representation election in which a rival union had participated. She also testified that she had no checking account and had for many years been accustomed to sending her dues by mail in the form of \$1 bills. One of her sisters-in-law, Ann Kardell, corroborated this testimony fully and stated that she saw Catherine put a number of dollar bills together with the union book and change of name form in an envelope, and put the envelope into a mail box near the corner drugstore.

The only evidence offered by the Union in support of its contention that Catherine Kardell had not paid her dues and had been improperly credited for the payment of dues for July and August 1953, is the testimony of Union Clerk Betty Lewis and Financial Secretary Sullivan. Lewis testified that another clerk had erroneously entered dues payments made by one of the Charging Party's sisters-in-law, Ruth Kardell, on Catherine Kardell's file card and that pursuant to this error the July and August stamps were placed in Catherine's union

book when it came back from the International's office in Chicago where it had been sent for entry of the name change. Lewis admitted, however, that she had not been present when the alleged mistake was made, nor did she identify the clerk who allegedly had made the erroneous entry. Sullivan, the Union's financial secretary, admitted that he could not testify whether or not the July and August dues were sent to the Union by the Charging Party, and that all he knew was that payment of such dues was not recorded in the Union's daybook pages. He further testified that he and a Board agent had gone over the Union's books and could find "no shortage or overage" for the months of July and August 1953. He gave no explanation how this related to the alleged mixup of names and stamps. Nor were the Union's books, referred to by him, offered in evidence.

Contrary to the Trial Examiner, we find Catherine Kardell's testimony neither confused nor contradictory, but, in fact, find it to be fully corroborated by the testimony of Ann Kardell. Nor is there any discrepancy in Catherine Kardell's testimony as to the approximate date of her dues payment. At the hearing she placed that date at around the time when another sister-in-law, Ruth, had paid her dues, which apparently was July 29, 1953. As both dates were given approximately, the discrepancy, relied upon by the Trial Examiner, is not material. Nor can we draw the inference, as the Trial Examiner did, that it is reasonable to suppose that if the Charging Party had paid her dues she would have contacted the Union after her name appeared on the delinquency notice of September 4, because Catherine Kardell testified without contradiction that she had not seen that notice before her discharge on September 18.

Union Clerk Lewis' testimony concerning the alleged clerical mistake is not based on firsthand knowledge, but on pure hearsay. The Union's books were not offered in evidence, and Sullivan's testimony as to their alleged contents is neither the best evidence available nor conclusive. We, therefore, credit Catherine Kardell's testimony, corroborated as it was by the unchallenged testimony of Ann Kardell, that she had paid her dues. Accordingly, we reject the Union's defense of dues delinquency, and find that the Union, by causing the discharge of Catherine Kardell although she had paid her periodic dues, violated Section 8 (b) (2) and (1) (A) of the Act.

4. The case against the Company

The General Counsel charges the Company with having approved the notice of August 17 and thereby having become chargeable with knowledge that the Charging Party's discharge was being sought by the Union for reasons other than failure to pay dues. The credible and uncontroverted testimony of McGee and Starkey that neither had approved nor had seen the notice before the discharge, refutes this

charge. Moreover, neither in September 1953 nor at any other time, did the Union mention Kardell's failure to pay assessments or fines as a reason for asking for her discharge. Also, the delinquency notice of September 4 speaks only of dues, as does the Union's letter to McGee confirming the verbal discharge demand.

On the record, we are persuaded that the Company undertook only to carry out its obligations under the union-security clause.⁴ McGee gave the Charging Party the opportunity to submit her union book for his inspection. As she did not avail herself of this opportunity, and as there was nothing to indicate to McGee that the Union had any ulterior motive or animosity toward Mrs. Kardell, McGee was justified in relying on the assurances of Sullivan that the Union was demanding the Charging Party's discharge because of her delinquency in paying her dues. Accordingly, as the Company had no reasonable grounds for believing that the Union's discharge request was motivated by reasons other than the Charging Party's alleged failure to tender her periodic dues, we find that the Company did not violate Section 8 (a) (3) and (1) of the Act by discharging Kardell.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent Union set forth in section III, above, occurring in connection with the operations of the Company described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent Union engaged in certain unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act, we shall order the Respondent Union to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent Union to make Catherine Kardell whole for any loss of pay suffered by her as the result of the Union's unlawful conduct, by paying to her a sum of money equal to the amount she would normally have earned as wages from the date the discrimination occurred to the date she is reinstated by the Company in accordance with the latter's normal business operations. In computing the amount of back pay due to the Charging Party for this period, the customary formula of the Board set forth in *F. W. Woolworth Company*, 90 NLRB 289, shall be applied. As the Trial Examiner did not find that the Respondent Union had discriminated against the Charging Party, the period from the date of the Intermediate Report to the date of the Order herein shall, in accordance with our usual practice,

⁴ *Bloomngdale's*, 107 NLRB 91, reversed on other grounds, 216 F 2d 285 (C. A. 2).

be excluded in computing the amount of back pay due her.⁵ We shall further provide that the Union may terminate its liability for further accrual of back pay to the Charging Party by notifying the Company and the Charging Party that it has no objection to her reinstatement. The Union shall not thereafter be liable for any back pay accruing after 5 days from the giving of such notice.⁶

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

CONCLUSIONS OF LAW

1. The Great Atlantic & Pacific Tea Company (Pittsburgh Bakery) is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Bakery & Confectionery Workers' International Union of America, Local 12, A. F. L., is a labor organization within the meaning of Section 2 (5) of the Act.

3. By causing the aforementioned Company to discriminate against the Charging Party in violation of Section 8 (a) (3) of the Act, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) and (1) (A) of the Act.

4. By restraining and coercing employees of the Company in the exercise of rights guaranteed in Section 7 of the Act, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

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

Order

Upon the entire record in this 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 Union, Bakery & Confectionery Workers' International Union of America, Local 12, A. F. L., its officers, agents, successors, or assigns, shall:

1. Cease and desist from:

(a) Promulgating, posting, keeping posted, or enforcing any notice or notices making the payment of assessments or fines for the non-payment of periodic dues a condition of employment.

⁵ *Utah Construction Co*, 95 NLRB 196.

⁶ *Pinkerton's National Detective Agency, Inc.*, 90 NLRB 205; *Local Union 595, International Association of Bridge, Structural and Ornamental Iron Workers, AFL*, 109 NLRB 73.

(b) Causing or attempting to cause The Great Atlantic & Pacific Tea Company (Pittsburgh Bakery), its officers, agents, successors, or assigns, to discriminate against Catherine Kardell or any other employee in violation of Section 8 (a) (3) of the Act.

(c) In any other manner restraining or coercing employees of The Great Atlantic & Pacific Tea Company (Pittsburgh Bakery), its officers, agents, successors, or assigns, in the exercise of the rights guaranteed in Section 7 of the Act, 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 by 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) Notify The Great Atlantic & Pacific Tea Company (Pittsburgh Bakery) and the Charging Party, Catherine Kardell, in writing that it has no objection to the Company's employment of Catherine Kardell.

(b) Make whole Catherine Kardell for any loss of pay she may have suffered as a result of the discrimination against her, in the manner set forth in section V entitled "The Remedy."

(c) Post in conspicuous places at the business office of the Respondent Union, and in all places where notices or communications to its members are customarily posted, copies of the notice attached hereto and marked "Appendix A."⁷ Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by the Respondent Union's representative, be posted by the Respondent Union immediately upon the receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for the Sixth Region signed copies of the notice attached hereto marked "Appendix A," for posting, the Company willing, on the bulletin boards of the Company at its bakery in Pittsburgh, Pennsylvania, where notices to employees are customarily posted. Such notices are to be posted and maintained for a period of sixty (60) consecutive days after receipt by the Company. Copies of the notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by an official representative of the Respondent Union, be forthwith returned to the Regional Director for said posting.

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

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."

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed, insofar as it alleges that the Respondent Company violated Section 8 (a) (3) and 8 (a) (1) of the Act.

MEMBER MURDOCK took no part in the consideration of the above Decision and Order.

Appendix A

NOTICE TO ALL MEMBERS OF BAKERY & CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL 12, A. F. L., AND TO ALL EMPLOYEES OF THE GREAT ATLANTIC & PACIFIC TEA COMPANY (PITTSBURGH BAKERY)

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our members and the employees of The Great Atlantic & Pacific Tea Company (Pittsburgh Bakery) that:

WE WILL NOT promulgate, post, keep posted, or enforce any notice or notices making the payment of assessments or fines for the nonpayment of periodic dues a condition of employment.

WE WILL NOT cause or attempt to cause The Great Atlantic & Pacific Tea Company (Pittsburgh Bakery), its officers, agents, successors, or assigns, to discriminate against Catherine Kardell, or any other employee in violation of Section 8 (a) (3) of the Act.

WE WILL NOT in any other manner restrain or coerce employees of The Great Atlantic & Pacific Tea Company (Pittsburgh Bakery), its officers, agents, successors, or assigns, in the exercise of the rights guaranteed in Section 7 of the Act, 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 by Section 8 (a) (3) of the Act.

WE WILL make Catherine Kardell whole for any loss of pay suffered by her as a result of having caused her discharge by The Great Atlantic & Pacific Tea Company (Pittsburgh Bakery).

WE WILL notify The Great Atlantic & Pacific Tea Company (Pittsburgh Bakery) and Catherine Kardell that we have no objection to the employment of Catherine Kardell.

BAKERY & CONFECTIONERY WORKERS'
INTERNATIONAL UNION OF AMERICA,
LOCAL 12, A. F. L.,

Labor Organization.

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.