

William Kahr and Leon Mohill, d/b/a Hamilton News Co. and John B. Graham, Jr.

Albany Mailers Union, Local No. 26, ITU, AFL-CIO and John B. Graham, Jr. *Cases Nos. 3-CA-1425 and 3-CB-446. November 28, 1960*

DECISION AND ORDER

On May 6, 1960, Trial Examiner Ralph Winkler issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent Company had engaged in and was engaging in certain unfair labor practices and recommending that the Respondent Company cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent Union had not engaged in any unfair labor practices and recommended dismissal of the complaint in Case No. 3-CB-446. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief, and the Respondent Union also filed a 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, and the entire record in these cases, including the exceptions and the briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only insofar as consistent with our decision herein.

The Trial Examiner concluded, on the basis of the evidence adduced at the hearing, that the General Counsel had failed to sustain the burden of his case against the Respondent Union. Accordingly, he dismissed the complaint insofar as it alleged that the Respondent Union had violated Section 8(b) (1) (A) and 8(b) (2) of the Act by causing the Respondent Company to discharge John B. Graham. However, the Trial Examiner also concluded that the Respondent Company had violated Section 8(a) (1) and (3) of the Act, basing this conclusion solely on the Company's failure in its answer to deny the pertinent allegations of the complaint.¹ We disagree with the Trial Examiner's finding of a violation by the Company. In our opinion, the Company's failure to deny the pertinent allegations in the complaint should not, under the circumstances, prevail over the failure of the record developed at the hearing to establish that the Company had, as a matter of fact, violated the Act.

¹ Section 102.20 of the Board's Rules and Regulations, Series 8, provides in relevant part ". . . any allegation in the complaint not specifically denied or explained in an answer filed, . . . shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown."

Although the Trial Examiner fully accepted the Company's failure to deny the allegations of the complaint as an admission of its liability for Graham's discharge, he nevertheless found "unreliable" the testimony of the Company's witnesses and of Graham that Graham was discharged at the Union's request. This testimony was entirely consistent with the Company's answer. The result of the Trial Examiner's disposition of this matter is that the Company is found to have discharged Graham at the request of the Union in violation of Section 8(a)(1) and (3), even though the testimony developed at the hearing was not deemed adequate to support a finding that the Union had made such a request. Such a result is clearly inequitable, for it would impose a backpay order on an employer for discharging an employee at the behest of a union even though there has been a failure of proof that the union demanded the discharge.

In the rather unique circumstances of this case, we believe that the Board would be exalting formalism and placing undue reliance on a technicality were it to accept the Company's failure to deny certain allegations of the complaint as adequate grounds for issuance of an order against the Company. Although at common law a party might have to stand or fall on his strict adherence to the rules of pleading, the flexibility of the administrative process permits the relaxation of pleading requirements where the purposes of the statute and the ends of justice will be served best. Accordingly, we conclude that the only equitable resolution of this case is to dismiss the entire complaint.

[The Board dismissed the complaint.]

MEMBERS JENKINS and FANNING took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This consolidated proceeding, with all parties represented,¹ was heard before the duly designated Trial Examiner in Albany, New York, on February 23 and 24, 1960, on complaint of the General Counsel and answers of the respective Respondents. The issues litigated were whether Respondent Company (as the individual employers are herein collectively designated) violated Section 8(a)(1) and (3) of the Act and whether Respondent Union violated Section 8(b)(1)(A) and (2) of the Act.

Upon the entire record and my observation of the witnesses and upon consideration of briefs, I hereby make the following:

¹ Respondent William Kahr died on January 24, 1959, shortly before this hearing, and the record does not indicate the present status respecting the administration of his estate. However, an answer was filed in his and his copartner's behalf (Respondent Mohill) and their Company was otherwise represented by counsel at this hearing. A compliance hearing can be had, if necessary, to resolve pertinent questions which cannot otherwise be settled by the parties. For purposes of this proceeding, the designation "William Kahr" will refer to the individual or his estate.

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT COMPANY

William Kahr and Leon Mohill, herein collectively called the Company, have constituted a partnership doing business under the trade name and style of Hamilton News Co. The Company has its principal office and place of business in Albany, New York, where it is engaged in the wholesale distribution of newspapers, periodicals, and related products. During the past year (1959), the Company made interstate purchases exceeding a value of \$100,000, but less than \$500,000.

Admitting in effect legal jurisdiction in the premises and that the amount of its aforesaid interstate activities meets the current jurisdictional standards of the Board, the Company contends that such dollar volume is insufficient under the jurisdictional standards of the Board in effect at the time of the alleged discriminatory discharge of John B. Graham. The complaint alleges, and the Company admits, that the Company discharged Graham "on or about November 17, 1958," and the record fixes the date as November 17, 1958. More than a month before said discharges, the Board had publicly announced the adoption of the current jurisdictional standards,² and it promulgated these standards by decisional holding on November 14, 1958, in *Siemons Mailing Service*, 122 NLRB 81. The current jurisdictional standards were operative at the time of Graham's discharge, and I accordingly find, without regard to other considerations, that the Company's interstate business satisfied both the statutory and the Board's own jurisdictional requirements as of November 17, 1958. I therefore reject Respondent Company's claim, and I find that the Company was and is engaged in commerce within Section 2(6) and (7) of the Act.

II. RESPONDENT LABOR ORGANIZATION INVOLVED

Albany Mailers Union, Local No. 26, ITU, AFL-CIO, herein called the Union or Local No. 26, is a labor organization within Section 2(5) of the Act.

III. PRELIMINARY PROCEDURAL MATTERS

The Union moves to dismiss the complaint against it on the ground that the charge in Case No. 2-CB-2567 was not filed and served within the limitations period prescribed in the proviso to Section 10(b) of the Act. This proviso reads, in part, as follows:

. . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

The pertinent portions of the Board's Rules and Regulations³ are as follows:

SEC. 102.111

(a) Charges . . . may be served personally or by registered mail
* * * * *

SEC. 102.113

(a) The date of service shall be the day when the matter served is deposited in the United States mail or is delivered in person, as the case may be. In computing the time from such date, the provisions of section 102.114 apply.
* * * * *

SEC. 102.114

(a) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run, is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day, which is neither a Sunday or a legal holiday. . . . For the purpose of this section a Saturday on which the Board's offices are not open for business shall be considered as a holiday, but a half holiday shall be considered as other days and not as a holiday. . . .

² Press Release (R-576) October 2, 1958

³ Series 8, effective November 13, 1959. These particular provisions are identical to provisions in the Board's Rules and Regulations, Series 7, which were operative at material times here, from November 1958 through May 1959.

(b) When the act or any of these rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the close of business of the last day of the time limit, if any, for such filing. . . .

Accordingly, in order to satisfy Section 10(b), an unfair labor practice charge respecting an alleged discriminatory discharge on November 17, 1958, must have been filed and served no later than by the close of business on May 18, 1959. See *Crosby Construction Co.*, 93 NLRB 28; *The Baltimore Transfer Company of Baltimore City, Inc.*, 94 NLRB 1680.

The Board has no Regional Office in Albany, New York, where the Company, Local No. 26, and Graham are located. Albany is serviced by the Board's Second Regional Office in New York City, which is approximately 150 miles from Albany.⁴ Graham filed charges in the CB portion of this consolidated case on May 11, 1959, and these charges were served on or about May 12, 1959. Instead of naming Local No. 26 as Respondent labor organization, the May 11 charge in Case No. 2-CB-2567 incorrectly designated, and was served upon, Albany Typographical Union Local No. 4, a sister local of Local No. 26. Local No. 26 and Local No. 4 are the only ITU locals located in Albany, and Local No. 4 is the only ITU local listed in the Albany telephone directory. Allen Loveday is president of Local No. 4; Ralph Cippolo and his brother, John Cippolo, are president and secretary-treasurer, respectively, of Local No. 26. Loveday called John Cippolo shortly after receiving the May 11 charge, and he in effect informed Cippolo that Graham had charged Local No. 4 with having caused Respondent Company to discharge Graham on November 17, 1958. Respondent Local No. 26 had been in contractual relationship for several years with Respondent Company at the time and Graham had been an employee of Respondent Company and a member of Local 26 for a 2-year period immediately preceding his discharge. So far as appears, Local No. 4 is in no way involved with Respondent Company. Loveday's call plainly put Respondent Local No. 26 on notice that Graham was instituting an unfair labor practice action against it because of the November 17 discharge.

The Regional Office meanwhile became aware of the incorrect designation of the Respondent labor organization in the May 11 CB charge,⁵ and it accordingly sent five duplicate originals of a corrected charge to Graham for the latter's signature; Graham received these corrected forms on Friday, May 15. Charge forms contain a box for the insertion of the filing date, with instructions that such information is to be inscribed by the Regional Office; the corrected forms sent to Graham did not contain a filing date. Graham signed the five charge forms and mailed four to the Regional Office on May 15. The next day, May 16, Graham personally delivered the fifth copy to Ralph Cippolo. On Monday, May 18,⁶ the Regional Office received the newly signed charges mailed by Graham; the Regional Office inscribed a May 18 filing date thereon and the next day, May 19, it mailed one of them to Respondent Local No. 26.

Respondent Union (Local No. 26) had notice of the incorrect charge and then received the corrected charge by personal service within the 6-month period. And it also appears that the charge was timely filed. Contrary to Respondent Union's contention, there is "no directive, implicit or otherwise, that the filing and service be made in the same order as those words appears in the Act." *The Baltimore Transfer Company of Baltimore City, Inc.*, 94 NLRB 1680, 1681. I conclude that the charge in Case No. 2-CB-2567 was timely served and timely filed, and I accordingly deny the motion to dismiss on such basis. Cf. *Peterson Construction Company, Inc.*, 106 NLRB 850, 851.

IV. THE UNFAIR LABOR PRACTICES

Respondent Company discharged John Graham, Jr., on November 17, 1958, and rehired him on May 20, 1959. The General Counsel alleges that Respondent Union caused the Company to discharge Graham because Graham was not a member in good standing in the Union. The Company admits⁷ discharging Graham because he was not a union member and because Respondent Union "caused, compelled, required and instructed" the Company to do so. I accordingly conclude that the Com-

⁴ Albany will be within the Buffalo Regional Office of the Board, effective May 2, 1960.

⁵ The CA charge against the Company contains the same erroneous designation of labor organization.

⁶ The Regional Office is closed on Saturday.

⁷ By failure of its answer to deny material allegations of the complaint. See Section 102.20, Board's Rules and Regulations, Series 8

panty has thereby violated Section 8(a)(1) and (3) of the Act, as alleged. The Union denies causing Graham's discharge and it further asserts that the Company terminated Graham for absenteeism.

The Company and the Union have been parties to a series of collective-bargaining agreements for many years. The contract, which was effective during material times here, does not contain a union-shop or any similar provision, and the record shows that there are nonunion employees in the unit covered by this contract.

Graham entered Respondent's employ in June 1956. He voluntarily joined the Union in December 1956, without any solicitation by union or company representatives. Graham stopped paying union dues in 1957. The union bylaws provide, in effect, that a member is automatically suspended upon a 4-month delinquency. The Union nevertheless carried Graham on its roster since 1957, and it paid Graham's *per capita* tax to the International during this entire period. Sometime in October 1958, Secretary-Treasurer John Cippolo told Graham that he would be suspended from union membership unless he paid 2 months' dues⁸ by November 10; Graham testified, and Cippolo denied, that Cippolo also said on this occasion that Graham would not be working for the Company unless Graham made such payment. Graham did not pay the dues, and Cippolo noted Graham's suspension on union records on or about November 10.

Graham had been either laid off or discharged in or about March 1958 for absenteeism, and the Union interceded for Graham and secured his reinstatement on that occasion even though—as already indicated—Graham was long delinquent at the time in his dues payments to the Union. John Cippolo testified without contradiction, that Graham's foreman, Edward Cox, frequently complained to Cippolo concerning Graham's persistent absenteeism and he testified that Cox also asked Cippolo on these occasions how long the Union would continue to protect Graham. According to Cippolo's testimony, Cox made such complaint to Cippolo on November 10, 1958; Cippolo further testified that he told Cox on that occasion that Graham was suspended from the Union but that the Union would continue to represent and protect Graham should Graham file any grievances against the Company.⁹

Graham testified that he answered the telephone at work on November 17, that John Cippolo was calling, and that Cippolo recognized Graham's voice. According to Graham's testimony, Cippolo inquired whether Graham was going to pay his union dues and Graham replied he would not. Graham further testified that Cippolo then asked to speak with Foreman Cox and that Graham then heard Cox say to Cippolo, as part of Cox's telephone conversation with Cippolo, that "if that is the way it has to be, that is the way it has to be." Graham testified that Cox then went into the company office and directly returned to the shop area and that Cox then dialed the shop telephone and asked to speak with Company Manager Charles Fruscione and that Cox then told the person on the other end, presumably Fruscione according to Graham's testimony, that he (Cox) was told to get rid of Graham. Cox hung up the telephone and then told Graham, according to Graham's testimony, that "this is it," and in effect discharged Graham.

It appeared, on cross-examination of Graham, that Graham had executed an affidavit on May 19, 1959, during the investigation of the case and that Graham stated in his affidavit that it was Cox who answered the telephone on the aforementioned occasion of Cippolo's purported call and that Cox thereupon called Graham to the telephone. The affidavit then later recites that Graham was not certain whether he or Cox first answered the telephone on that occasion. Graham then testified in purported explanation of the inconsistency, that in reading over the affidavit he recalled that was he, and not Cox, who had answered the telephone.

Cox testified¹⁰ that Graham answered the telephone call from Cippolo on November 17 and that Graham told Cox the call was for Cox. Cox testified that he then spoke to Cippolo and Cippolo inquired why Graham had not been discharged. Cox testified that, upon completing this conversation with Cippolo, he (Cox) went into Fruscione's office and informed Fruscione of Cippolo's call and that Fruscione said, "if that is the way it's supposed to be, that is the way you will do it," and that he (Cox) thereupon returned to the shop and discharged Graham. Cox further testified that during the period from November 10 (when Cippolo advised Cox of Graham's suspension) until Cox told Fruscione of Cippolo's purported call on No-

⁸ This was much less than Graham's dues arrearages.

⁹ Cox testified that Cippolo advised him at a union meeting on November 10, of Graham's suspension. There was no union meeting on that date, and I mention this only in connection with credibility matters hereinafter discussed.

¹⁰ Cox was called as a witness for the General Counsel. Cox is a member of the Union.

vember 17, he (Cox) did not recall discussing the union suspension of Graham with Fruscione.

Fruscione was called and examined by the General Counsel under Rule 43(b) of the Federal Rules of Civil Procedure.¹¹ Fruscione testified on direct examination that Cox came into his office on November 17 and advised him that the Union had told Cox to discharge Graham and that Fruscione then discussed the matter with one of the Respondent partners, following which he instructed Cox to discharge Graham if that was the Union's wish. Fruscione testified on cross-examination that the decision to discharge Graham was made several days after Cox had informed Fruscione of the Union's requested discharge of Graham. Fruscione further testified that his mentioned discussion with Cox did not concern any telephone call made by the Union, but that the conversation dealt only with the Union's purported request as to Graham; Fruscione's affidavit executed during the investigation of the case states that Cox had advised him of Cippolo's "call."

John Cippolo testified that he called the Company on November 17 and that his only conversation on that occasion was with Cox concerning private matters, unnecessary to state here, which were unrelated to Graham or to any union affairs. Cippolo testified that he did not learn of Graham's discharge until at least 2 month after the event, and it also appears that Graham did not file a grievance with the Union concerning his discharge.

The Union contends, as already stated, that the Company discharged Graham for absenteeism and other unsatisfactoriness and Union President Ralph Cippolo testified without contradiction that Cox had frequently complained to him (Cippolo) about such absenteeism during the months immediately before the discharge and that Cox had mentioned in such connection that Graham was driving a cab. Graham did operate a cab for another employer and at first he testified that he drove the cab only once a week, on Sunday nights, during the period before his November discharge. Later he testified that he drove the cab once or twice a week, but that it did not interfere with his work at the shop. It is recalled that Graham had been laid off for absenteeism on March 1958; the record shows that Graham's absenteeism continued during the period immediately before his discharge.¹² Fruscione testified that Graham was an "average" worker and that he, Fruscione, was aware of Graham's absenteeism. Fruscione also testified that he reemployed Graham without discussing the matter with the Union and that, so far as he knows, the Union has not opposed such reemployment.

Concluding Findings

Section 10(c) provides that findings of unfair labor practices may be made only where supported by a preponderance of the record as a whole. Suspicion is not enough for these purposes. Respondent Company in effect conceded in its answer that it discharged Graham for union reasons at Respondent Union's behest, and there thus was no trial issue in that regard in the General Counsel's case against the Company. The Union did contest its responsibility for Graham's discharge, and the General Counsel is therefore obliged to establish such union liability by record preponderance.

I have set forth testimony of all witnesses respecting the November 17 and related events, particularly in regard to the inconsistencies of the Cippolo-Cox-Graham telephone conversation, and the General Counsel offered the testimony of Graham, Cox, and Fruscione to establish what he considers the historical facts under consideration. I am mindful, of course, that even honest witnesses may give testimony which varies in some respect from the testimony of other honest witnesses and that an honest witness may himself be inconsistent in his own testimony. The inconsistencies in and between the testimonies of the three-named witnesses are material ones in my judgement, and sufficiently so as to render all their testimony unreliable in this connection. This circumstance, together with the fact that I have no reason to discredit the testimony of John and Ralph Cippolo, leads me to conclude that the General Counsel has not sustained the burden of his case against the Union.

¹¹ It was clear at this point in the proceedings that, apart from its jurisdictional contentions mentioned above, the Company had conceded the gravamen of the complaint against it and that its further interest in the case was to establish the joint liability of the Union for Graham's backpay. Fruscione, in other words, was not adverse to the General Counsel.

¹² During the week ending November 2, 1958, Graham was absent 1 day; October 26, 3 days; October 19, 1 day; October 12, 1 day; October 5, 1 day; September 28, 2 days; September 21, 4 days; September 14, the whole week; and September 7, 1 day.

Again, because of the unusualness of the instant situation¹³ in finding against the Company on the pleadings and for the Union on the entire record made, it should be stated that it is not enough to raise suspicious circumstances in order to support an adverse finding against a party respondent; nor is it necessary that I sustain a respondent party's affirmative defense contentions as an exclusive alternative to finding such party to have violated the Act. All I find and all I need find here is that the contentions of the General Counsel are not supported by a preponderance of reliable testimony.

I accordingly conclude in Case No. 2-CA-6599 that Respondent Company discriminatorily discharged Graham for union reasons; and, in Case No. 2-CA-6599, I conclude that General Counsel has failed to prove Respondent Union responsible for Graham's discharge.

V. THE REMEDY

Having found that Respondent Company has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and that it take affirmative action to effectuate the policies of the Act.

Respondent Company has reinstated Graham but without otherwise making him whole. I shall accordingly recommend that the Company make Graham whole for any loss of pay he may have suffered by reason of his discharge by paying him a sum of money equal to the amount he would have earned from the date of his discharge to the date of offer of reinstatement less his net earnings¹⁴ to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, 291-294. Earnings in one quarter shall have no effect upon the backpay liability for any other such period. It will also be recommended that Respondent Company make available to the Board, upon request, payroll and other records to facilitate checking the backpay due. *F. W. Woolworth Company, supra*.

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

CONCLUSIONS OF LAW

1. Respondent Local No. 26 is a labor organization within Section 2(5) of the Act.
2. Respondent Company is engaged in commerce within Section 2(6) and (7) of the Act.
3. Respondent Company has violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging John B. Graham, Jr.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within Section 2(6) and (7) of the Act.
5. The record does not preponderantly establish that Respondent Local No. 26 has violated Section 8(b)(1)(A) and (2) of the Act.

[Recommendations omitted from publication.]

¹³ Cf. *United Brick & Clay Workers of America, et al. v. Deena Artware, Inc.*, 198 F. 2d 637, 642 (C.A. 6), cert. denied 344 U.S. 897.

¹⁴ *Crossett Lumber Company*, 8 NLRB 440, 497-498.

Holland Manufacturing Company and United Steelworkers of America, AFL-CIO. *Case No. 22-CA-525. November 28, 1960*

DECISION AND ORDER

On July 20, 1960, Trial Examiner Phil Saunders issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.