

Publishing Company and Local No. 4 International Brotherhood of Electrical Workers, AFL-CIO.

2. Local 4, International Brotherhood of Electrical Workers is not and has not been lawfully entitled to force or require the Pulitzer Publishing Company to assign the work of library filing, indexing, and recordkeeping of tapes recorded or aired on the Company's equipment known as the Collins unit to members of said Local 4 rather than to employees who are not members of said labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, said Local 4, IBEW shall notify the Regional Director for the Fourteenth Region in writing whether or not it accepts the Board's determination of this dispute and whether or not it will refrain from forcing or requiring the Pulitzer Publishing Company, by means proscribed by Section 8(b)(4)(i)(D) of the Act to assign the work in dispute to employees who are members of the IBEW or represented by it.

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**Edward P. Tepper d/b/a Shoenberg Farms and Milk Drivers and Dairy Employees Local Union No. 537, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case No. 27-CA-807 (formerly 30-CA-807). December 16, 1960**

#### DECISION AND ORDER

On July 27, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging 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.

Pursuant to Section 3(b) of the National Labor Relations Act, the Board has delegated its powers to a three-member panel [Members Rodgers, Jenkins, and Fanning].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case,<sup>1</sup> and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.<sup>2</sup>

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<sup>1</sup>The Respondent's request for oral argument is hereby denied. In our opinion, the record, the exceptions, and the brief adequately present the issues and positions of the parties.

<sup>2</sup>In adopting the finding that the employees in question are nonagricultural, we rely on *H. A. Rider & Sons*, 117 NLRB 517, at 519, as precedent for the finding.

## 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, Edward P. Tepper d/b/a Shoenberg Farms, Arveda, Colorado, his officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Union, or in any other labor organization of his employees, by discriminating in regard to hire or tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes 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 in the manner and to the extent authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

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

(a) To the extent that he has not already done so, offer to Omer Guthrie, Earl Bradley, James Gongwer, Wayne Bryant, and Briggs M. Davis immediate and full reinstatement each to his former or substantially equivalent position and make each whole for any loss of earnings in the manner set forth herein in the section of the Intermediate Report entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other such data convenient for a computation of backpay due.

(c) Post at its plant in Arveda, Colorado, copies of the notice attached hereto marked "Appendix."<sup>3</sup> Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by the Respondent's representative, be posted by him immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

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<sup>3</sup> 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."

(d) Notify the Regional Director for the Twenty-seventh Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

## APPENDIX

### NOTICE TO ALL DAIRY PLANT 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, I hereby notify you that:

I WILL offer, to the extent not yet done, to Omer Guthrie, Earl Bradley, James Gongwer, Wayne Bryant, and Briggs M. Davis, immediate and full reinstatement each to his former or substantially equivalent position, without prejudice to seniority or other rights and privileges, and make each of them whole for any loss of earnings sustained by reason of the discrimination against them on March 12, 1960.

I WILL NOT by means of discharge or in any other manner interfere with, restrain, or coerce my employees in the exercise of their rights to self-organization, to form, join, or assist Milk Drivers and Dairy Employees Local Union No. 537, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and 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, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

All my employees in the dairy plant operation are free to become or remain or refrain from becoming or remaining members of the above-named Union, or any other labor organization. I will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity in behalf of any labor organization.

EDWARD P. TEPPER D/B/A SHOENBERG FARMS,  
*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 AND RECOMMENDED ORDER

## STATEMENT OF THE CASE

This matter was tried before the duly designated Trial Examiner in Denver, Colorado, on May 10, 1960. At issue is whether Edward P. Tepper d/b/a Shoenberg Farms, herein called the Respondent or Tepper, discharged five employees because of their membership in or interest in Milk Drivers and Dairy Employees Local Union No. 537, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union. The complaint of the General Counsel upon a charge filed by the Union alleges that the Respondent has thus engaged 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 the Act.

Briefs have been received from counsel for the General Counsel and the Counsel for the Respondent. The unopposed motion of the General Counsel to correct the transcript is hereby granted.

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

## FINDINGS OF FACT

## I. THE BUSINESS OF RESPONDENT

The Respondent is a sole proprietorship operating a dairy farm and dairy business near Denver, Colorado. His dairy herd produces about 300 gallons of milk a day and he purchases as much as 3,000 gallons a day from other producers. The milk is then pasteurized, bottled, and delivered to retail outlets. Respondent's annual gross sales range from \$1,250,000 to \$1,500,000. Purchases of eggs for resale from a point in the State of Utah exceed \$50,000 annually. The employees whose discharge is the subject of this complaint were at the time of discharge regularly employed full time in processing, bottling, and delivering milk and other dairy products. I find that Respondent's operations are in, and affect, commerce within the meaning of Section 2(6) and (7) of the Act and that the discharged employees are not agricultural laborers.

## II. THE ORGANIZATION INVOLVED

The Union is a labor organization admitting to membership employees of the Respondent.

## III. THE UNFAIR LABOR PRACTICES

On Thursday, March 10, 1960, some of the men in the dairy plant discussed the possibility of having a union to represent them. In consequence employees Wayne Bryant, Briggs M. Davis, Omer Guthrie, Earl Bradley, and James Gongwer on the evening of March 11 met at the home of the last named with two union representatives. At the invitation of the men, Frank Yatckoske, Respondent's dairy superintendent, attended the meeting. After a discussion all five of the employees signed cards designating the Union as their bargaining representative. Yatckoske did not. At the end of the workday on Saturday, March 12, each of the five employees was handed his check by Tepper and told that he was discharged. Guthrie testified that on this occasion Tepper said, "I never thought you would do anything like this." Tepper testified that he had no recollection of making such a remark. Others discharged on this occasion were told, they testified, that the discharges came about as a result of a "change in policy."

Tepper conceded that all of the men were good workers but said that they recently appeared to be "disgruntled" and seemed to be slowing down in their work.

Guthrie had worked for the Respondent for about 13 years. He had threatened to quit on several occasions but Tepper always persuaded him to stay. There is evidence that Guthrie on occasion did not wear a hat while at work in violation of health regulations but I am unpersuaded that this fault played any significant part in Respondent's decision to discharge him. Guthrie's work performance was never criticized by the Respondent.

Bradley worked for Tepper for more than 7 years. There is no testimony concerning any particular conduct evidencing incompetence or carelessness on the part of Bradley and 16 days after his discharge the Respondent rehired him.

Gongwer, after working for the Respondent on an earlier occasion, returned to his employment in June 1959. On March 10 he inquired of Tepper's son, who is in charge of the plant in the absence of his father, concerning the possibilities of promotion. In the conversation the son told Gongwer that he was satisfied with Gongwer's

work. There is no evidence of criticism leveled at Gongwer at any time in respect to his work performance.

Bryant worked for the Respondent about 4 years. There is no explanation given for Bryant's discharge and no testimony on the part of the Respondent as to any dissatisfaction with Bryant as an employee. He was rehired 19 days after his discharge.

Davis worked about 18 months for the Respondent. About a month before his discharge he dented the top of the truck which he operated and about 2 weeks earlier had bent a fender in a collision with a hay wagon. He was told by Tepper's son to be more careful in his driving.

In his testimony Tepper described Yatcoske as "a full-time plant operator. He has full charge of the plant." Yatcoske described himself as plant superintendent. He has authority to recommend discharge to the Respondent. Tepper testified that because of the general attitude of the crew in the plant he decided to "clean house and to start all over again." He denied having any knowledge from any source that the men had been discussing a union and denied in particular that he had learned anything in that respect from Yatcoske. Yatcoske testified that he was not consulted in the matter of discharges and that he did not know they had been determined upon until they took place. Yatcoske denied that he had mentioned to Tepper anything about the meeting of the men with union representatives.

The triviality of some of the complaints concerning the discharged men voiced by the Respondent from the witness stand and the staleness of others, his candid admission that all were good workers, and the rehiring of two of them within a period of 3 weeks, supports the conclusion that Tepper made the discharges because of his belief that the men had joined the Union. How this knowledge came to him is a matter for inference from the established facts. A meeting with union agents was held. The five men who were discharged on the following day attended and signed cards. Yatcoske was present. The likelihood that the plant superintendent would impart this information to the Respondent is a strong one. He was a part of management and, arguably, at least, had an obligation to acquaint Tepper with this development. I do not credit the denials of Tepper or Yatcoske in this particular. It is, of course, true that an employer may discharge as he pleases save only that his motivation may not be one proscribed by the Act. My conclusion as to motivation rests upon several factors. Considering that three of those discharged had been employed for a number of years and the other two for a number of months, it is unlikely that they were discharged upon a whim. Some motivation must have attended that decision. If considerations of employee efficiency and conduct were at all controlling it would seem that Yatcoske, the man in "full charge of the plant," would have been consulted. He testified that he was not. The reasons given by Tepper in his testimony border on the frivolous. I do not believe them. His remark to Guthrie, "I never thought you would do anything like this," on the occasion of Guthrie's discharge stands undenied and unexplained. I think that it has meaning and that it constitutes an admission on the part of the Respondent that he was aware of Guthrie's involvement with the Union. I am satisfied that the discharges of the other men resulted from Tepper's belief that they were allied with Guthrie in the matter.

I find that the Respondent discharged Guthrie, Bradley, Gongwer, Bryant, and Davis because of his belief that they had joined a union or involved themselves in some fashion with the Union. By the discharges the Respondent discriminated in regard to tenure of employment of these individuals to discourage membership in or activity in behalf of the Union. I find that the Respondent thereby violated Section 8(a)(1) and (3) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with his operations 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 has engaged in certain unfair labor practices, it will be recommended that he cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has discriminated in regard to the tenure of employment of Guthrie, Bradley, Gongwer, Bryant, and Davis, it will be recom-

mended that to the extent he has not already done so, he offer to each of them immediate and full reinstatement each to his former or substantially equivalent position without prejudice to seniority and other rights and privileges previously enjoyed. Each shall be made whole for any loss of earnings sustained by reason of the discrimination by payment to him of a sum of money equal to the amount he would have earned from March 12, 1960, to the date of reinstatement or offer of reinstatement less his net earnings during that period. Backpay shall be computed in accordance with the Board's *Woolworth* formula.<sup>1</sup> Loss of pay shall be determined by deducting from a sum equal to that which he would have earned for each quarter or portion thereof, his net earnings in other employment during that period. Earnings in one particular quarter shall have no effect upon backpay liability for any other quarter.

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

#### CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.
2. By discharging Omer Guthrie, Earl Bradley, James Gongwer, Wayne Bryant, and Briggs M. Davis on March 12, 1960, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
3. By the discharges, the Respondent had interfered with, restrained, and coerced his employees in the exercise of rights guaranteed in Section 7 of the Act and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

<sup>1</sup> *F. W. Woolworth Company*, 90 NLRB 289

**Local 84, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO [South Texas Building Company] and Barney J. Smith.** *Case No. 23-CB-330. December 19, 1960*

#### DECISION AND ORDER

On July 6, 1960, Trial Examiner Arthur Leff issued his Intermediate Report in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging 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.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Fanning, and Kimball].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. These rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case,