

**Tampa Coca-Cola Bottling Company and International Union of Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO.** *Case No. 12-CA-1263. March 23, 1961*

### DECISION AND ORDER

On October 27, 1960, Trial Examiner Thomas F. Maher issued his Intermediate Report in the above-entitled proceeding, recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, exceptions to the Intermediate Report were filed by the General Counsel.

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

The Trial Examiner neglected to set forth any findings, conclusions, or recommendations in his Intermediate Report with respect to an allegation in the complaint that Respondent had violated Section 8(a)(4) of the Act by refusing to reinstate Neil S. Anthony because he filed charges under the Act.

There is no dispute in the record that on September 3, 1959, immediately after being told by Superintendent Kelsey that he was being discharged for taking lead seals, contrary to instructions,<sup>3</sup> Anthony requested Kelsey to reconsider the discharge action because he (Anthony) had a wife and two children and needed the work. Kelsey agreed to consider over the weekend whether he would reinstate Anthony.

The day following his discharge, Anthony filed a charge alleging that Respondent had violated Section 8(a)(1) and (3) of the Act by discharging him on September 3, 1959.<sup>4</sup>

The testimony of Kelsey conflicts with the testimony of Anthony as to what transpired when the latter returned to Respondent's plant the week following his discharge.

<sup>1</sup> 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, Leedom, and Fanning].

<sup>2</sup> The record establishes that Superintendent Kelsey asked Valdez #2, what he "intended to do to run over to the Labor Relations Board," on August 21, 1959, rather than at the time of his termination on August 26, as found by the Trial Examiner. This error, however, does not affect our agreement with the Trial Examiner that the discharge of Valdez #2 did not violate the Act.

<sup>3</sup> The Trial Examiner found and we agree that Anthony's discharge did not violate the Act.

<sup>4</sup> This charge was given Case No. 12-CA-1199. Subsequently, on October 19, 1959, Anthony's discharge was included in the original charge filed in the instant case.

Anthony testified that on Tuesday, September 8, 1959, about 11:30 a.m., he arrived at the plant and after he had waited about 10 minutes Kelsey came through the lobby; that after he and Kelsey had said "Good morning" to each other, he asked Kelsey "what he thought about taking me back; and he [Kelsey] said that since I had filed that charge at the Labor Board that there was nothing he could do about it, and that he had got the charge that morning on his desk." Anthony stated that he had no further conversation with Kelsey on that occasion except to say "thank you Mr. Kelsey" and that he then left the plant.

Kelsey, on the other hand, testified that following Anthony's discharge he got to thinking about the number of pliers, screwdrivers, and wrenches that had been missing in the plant and the fact that he had been unable to determine who was responsible.<sup>5</sup> He further testified, in substance, that Anthony's appropriation of the lead seals had aroused his suspicion that Anthony might also have been responsible for the missing tools.<sup>6</sup>

With reference to Anthony's request for reinstatement, Kelsey testified that, to the best of his recollection, Anthony returned to the plant on September 7, 1959, about 11 a.m.; that Anthony asked "Mr. Kelsey how about it?"; and that he [Kelsey] replied, "Well I have thought this thing through, and I can't use you." According to Kelsey this was the entire conversation on that occasion.

The only evidence which would support this allegation of the complaint, concerning the refusal to reinstate Anthony, is Anthony's testimony that Kelsey told him he could not be reinstated because he had filed a charge with the Board. Anthony's testimony in that regard was not corroborated by any other witness. The Trial Examiner in his Intermediate Report found Anthony to be an unreliable witness whose testimony he did not credit except where it constituted an admission against his own interest, or where it was corroborated by other testimony from a credible witness. We find no basis in the record for rejecting the Trial Examiner's estimate of Anthony's credibility. In addition, the charge itself casts doubt upon Anthony's testimony, for that charge was not mailed to Respondent until 2:30 p.m., on September 8, 1959, which time, even according to Anthony's testimony, would have been several hours after his conversation with Kelsey had been concluded, and therefore, contrary to Anthony's testimony as to Kelsey's alleged statement, it could not have been on Kelsey's desk at the time of the conversation. Therefore, we discredit Anthony's testimony and credit Kelsey's with respect to the conversation between Kelsey and Anthony when the latter returned to

<sup>5</sup> Earlier testimony of Kelsey and Sales Manager H. T. Protiva establishes that the disappearance of these tools had been a matter of grave concern to Kelsey for at least 8 months immediately prior to Anthony's discharge.

<sup>6</sup> Kelsey also testified that tools ceased to disappear after Anthony's discharge.

Respondent's plant to inquire about the possibility of reinstatement, and find that the General Counsel has failed to prove by a preponderance of the credible evidence that the failure to reinstate Anthony was unlawfully motivated.

Accordingly, we shall also dismiss this allegation of the complaint.

[The Board dismissed the complaint.]

## INTERMEDIATE REPORT

### STATEMENT OF THE CASE

Upon charges filed on October 19, November 18, and December 2, 1959, by International Union of Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, Charging Party herein, the Regional Director for the Twelfth Region of the National Labor Relations Board, herein referred to as the Board, issued a complaint on December 8, 1959, against Tampa Coca-Cola Bottling Company, Respondent herein, alleging violations of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act. In its duly filed answer Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practice.

Pursuant to notice, a hearing was held before the duly-designated Trial Examiner on May 31, 1960, at Tampa, Florida. All parties were represented at the hearing and were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. Oral argument was waived by counsel for Respondent and in lieu thereof he filed a brief with me thereafter.

Upon consideration of the entire record before me, the brief of Respondent, and upon my observation of the witnesses, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT

Respondent Tampa Coca-Cola Bottling Company is a Florida corporation maintaining its office and principal place of business at Tampa, Florida, where it is engaged in the manufacture, sale, and distribution of soft drinks and related products. In the course and conduct of its business operations the Respondent annually purchased goods and materials in excess of \$50,000 from States of the United States other than the State of Florida. It is admitted that the Respondent is engaged in commerce within the meaning of the Act and I so find.

#### II. THE LABOR ORGANIZATION INVOLVED

International Union of Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ISSUE INVOLVED

Whether there is credible evidence to support a conclusion that employees Valdez #2 and Anthony were discharged because of their union membership or for cause.

#### IV. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Introductory facts

Respondent's bottling plant employs approximately 52 production and maintenance employees as laborers, a classification which includes workers on the production line, bottle inspectors, forklift operators, and truckdrivers. At all times relevant herein Fred J. Kelsey was plant superintendent, William B. Bush was production manager, and H. T. Protiva was sales manager and assistant general manager.<sup>1</sup>

Bottling operations are almost completely automatic, the empty bottles being washed, filled, capped, and set into cases on the bottling line by machine operation. As full cases roll along a conveyor to the end of the line they are lifted manually

<sup>1</sup> The general manager, James Warren, was absent on sick leave at the time of the hearing, and the company president, Henderson, took no part in the proceedings.

and stacked on wooden pallets—small movable platforms—which are then lifted by a forklift and loaded onto delivery trucks so constructed as to receive the stacked pallets along each side and the rear in compartments known as bays.

### B. Union organization

On or about July 27, 1959, a number of production employees, including Vincente Valdez #2<sup>2</sup> and Neil Anthony, attended a meeting at the Union's headquarters, signed the membership applications, and received union buttons which they wore conspicuously on their clothing thereafter. There was no dispute that the Company was aware of the union interest among its employees, company officials having testified that they observed union buttons being worn by numerous employees, including the two named above.

### C. The termination of Vincente Valdez #2

#### 1. Facts

On August 21, Vincente Valdez #2, a laborer with 6 or 7 years seniority with the Company, was assigned the job of removing filled cases from the conveyor and stacking them on pallets to be ultimately loaded onto delivery trucks by the forklift operator, Dewey Simpson. Previously Valdez had been assigned duties in the premix room where the soft drink is "packaged" in bulk-form tanks, for automatic vending machine consumption. Earlier he had worked at loading empty cases onto the bottling line and at bottle inspecting.

During Valdez' first day at the case-stacking job, Production Manager Bush found it necessary to call his attention to the cases which he had stacked improperly, to which Valdez replied he was doing the best he could.<sup>3</sup> Valdez continued at this job for several days thereafter with no improvement in his work.

Valdez' ineptitude created two problems: (1) Because the filled cases were improperly stacked on the pallets these pallets could not be fitted into the bays of the delivery trucks unless they were first straightened; and (2) because the filled cases were not promptly lifted off the conveyor but were permitted to collect, a jam occurred at the end of the production line which would eventually cause an automatic shutdown of the whole bottling lane operation. Valdez' failure to remove the cases promptly and to stack them properly thus created two distinct muddles.<sup>4</sup>

As previously noted, Valdez' technique of lifting and stacking bottle cases did not improve with experience and Foreman Bush, on August 26, criticized him several times for the crooked stacking and for causing the bottling line to shut down. For several days previous Forklift Operator Simpson, who was the direct victim of Valdez' poor stacking, had called his attention to the shortcoming and found it necessary to himself realign the cases so that he could properly lift and store them. Valdez' only comment to Simpson was that Simpson should stack the cases himself if he was not satisfied with the way they were being stacked and that he, Valdez, was "going to stack them any way, crooked, sideways, any damn way I please." Valdez' success in this effort stopped the production line on numerous occasions.<sup>5</sup> Whereupon Foreman Bush reported the situation to Superintendent Kelsey, who took a hand in the matter. When Kelsey asked Valdez why he was stacking the cases improperly Valdez sought to excuse himself through lack of experience. In this respect, however, I credit Foreman Bush's testimony that the average employee could learn how to properly stack bottle cases in about an hour. Nor did Valdez ever deny, either in his reported conversation or in his testimony, that his shortcomings in this respect were not a fact. Replete in all accounts of his reprimands was his repeated insistence that he was doing the best he could.

<sup>2</sup>There are two employees of the Company named Vincente Valdez. To distinguish them the Company designates them as #1 and #2. I shall do likewise.

<sup>3</sup>Valdez' testimony with respect to events leading up to his discharge agrees substantially with the credited testimony of Bush and Plant Manager Kelsey, and I therefore credit him. I do not, however, rely upon the confusion of dates in his testimony wherein he mistakenly states he was discharged on August 21, on the occasion of Bush's first criticism of his work.

<sup>4</sup>The credited testimony of Bush, Kelsey, and Forklift Operator Simpson, substantially corroborated by Valdez, whose only excuse was that he had never done the work before.

<sup>5</sup>My observation of Valdez at the hearing satisfies me that he is physically equipped to perform the stacking duties assigned him. Nor was there any claim made to the contrary.

Later, on August 26, Kelsey again came to Valdez' place of work and, by Valdez' own admission, reprimanded him this time for jamming up the conveyor. Bush reprimanded him shortly thereafter, with the reply that he was doing the best he could. And finally, Kelsey came to him and told him that if he could not do any better he should quit and let someone else do the work.

There is a dispute in the record as to whether, at this point, Valdez quit or Kelsey fired him. In view of what then transpired the distinction is illusory for, according to the credited testimony of Bush and Kelsey, Valdez walked off to the timeclock, punched out, went to his locker, emptied it, and returned with the key which he gave to Kelsey.<sup>6</sup>

Valdez returned to work on the following morning, August 27, but was instructed by Bush not to go to work until he spoke to Kelsey. Kelsey thereafter advised Valdez that he had quit the day before when he had punched out without permission and turned in his locker key. Whereupon Valdez was permanently replaced by Horace Everett, who had been a soaker prior to his assignment as stacker. No jam-ups on the bottle line have since occurred, nor have improperly stacked cases been a problem to the forklift operators.

## 2. Conclusions

The only suggestion in the record and pleadings that Valdez #2 was terminated for discriminatory reasons was his conceded union membership, the union button he wore, and the fact that when he was terminated Kelsey asked him what he "intended to do, to run over to the Labor Relations Board"; a statement which Kelsey did not deny.

There is no dispute but that Valdez #2, after 5 days at the lifting and stacking job, was still unable or unwilling to properly set one bottle case upon another. Nor is there any dispute but that during that same period, by his failure to move fast enough or for some physical defect not shown in the record, Valdez #2 consistently permitted the conveyor to jam up, causing the entire production line to stop. Inherent in an employer's right to run his business is the right to have it run properly. He certainly does not lose this right when the errant employee, in this case Valdez #2, happens to be a known union member and a known union button wearer. The Act does not provide insulation in such circumstances.<sup>7</sup>

Nor does the employee's unsatisfactory conduct become justified when an employer, in the process of discharging him for it, suggests, as did Kelsey, that the discharged employee will probably file a charge with the Board. Such a reference to the Board's processes in the circumstances described herein does not convert a justifiable personnel action into evidence of antiunion motivation.<sup>8</sup> Kelsey, appearing to be a man of normal instincts, suggested that Valdez would make an issue of his discharge. The fact that a charge was filed respecting Valdez' termination would suggest that Kelsey's surmise was correct.

Upon all of the foregoing facts based upon the credited testimony of witnesses appearing before me, I find that Vincente Valdez #2 was terminated as a result of his unsatisfactory workmanship, without any reference whatever to his union membership. Accordingly, I shall recommend that the complaint, insofar as it alleges a violation in this respect, be dismissed.

### D. The discharge of Neil Anthony

#### 1. Facts

Neil Anthony, a bottle inspector with 4 years of seniority, was discharged by Superintendent Kelsey on September 3, 1959, after an investigation which disclosed that Anthony had disobeyed instructions and appropriated used lead seals.

The lead seals in question were round lead wafers of the approximate size of a dime in which was incased a short length of wire. These were used to seal fully loaded tanks of premixed soft drink, much in the fashion that like seals are used on gas and electric light meters. On the return of empty tanks to the plant for refilling the old, or used, seals are removed from the tank by a wire cutter and collected in a small wooden box in the premix room.

<sup>6</sup> I do not credit Valdez' testimony that Kelsey specifically told him to punch out.

<sup>7</sup> *N.L.R.B. v. The Newton Company*, 236 F. 2d 435, 438 (C.A. 5); *Frosty Morn Meats, Inc.*, 127 NLRB 1586; *Softexture Yarns, Inc.*, 128 NLRB 764.

<sup>8</sup> See *Vogue Lingerie, Inc. v. N.L.R.B.*, 280 F. 2d 224 (C.A. 3), for a description of aggravated circumstances in which such conduct would constitute a violation of the Act.

Until several weeks prior to Anthony's discharge the used lead seals were considered an expendable item and employees, including employee Anthony, took them home and sold them for scrap, with Foreman Bush's knowledge.<sup>9</sup> But in early August Kelsey, upon instructions from Company President Henderson, told Foreman Bush to save the used seals.<sup>10</sup> Bush, knowing Anthony was taking the lead home, passed on these instructions, directing him, in Anthony's words, "to put them in the premix room and not to take them home."<sup>11</sup> Despite Bush's instructions to him Anthony, by his own admission, on the close of business on September 2, took the accumulated lead seals home. On the following morning Bush confronted Anthony with the removal of the lead seals on the previous evening and Anthony readily admitted that he had taken them. Thereafter he was summoned to Superintendent Kelsey's office where he was questioned in the presence of Bush and Sales Manager Protiva. Anthony was again asked if he had taken the seals and he again admitted it, seeking to excuse himself by stating his understanding that the seals were to be put in a box, but that nothing was said about not taking them home. Thereafter in the meeting and again in his testimony before me Anthony conceded that he was told not to take the seals but that he did so nonetheless. At the conclusion of the interview Kelsey informed Anthony that he would have to let him go. Anthony was terminated as of that date.

## 2. Conclusions

I find nothing in the credited testimony in this case that would suggest that the discharge of Neil Anthony for appropriating used lead seals contrary to instructions was motivated by his membership in the Union. Except for variations in the testimony of the several witnesses the basic facts are undisputed. Anthony admits taking what he was told to leave alone. His known union membership is certainly no bar to the employer's right to settle this breach in the manner which circumstances would appear to demand. Accordingly, insofar as the complaint alleges Neil Anthony's discharge to be a violation of the Act, I shall recommend that it be dismissed.

### E. *The interrogation of employee Fields*

The only other issue remaining in the case<sup>12</sup> is the alleged interrogation of employee Arnold Fields. Fields testified that on the evening of July 27 Superintendent Kelsey asked him "what is this about the union meeting?"; to which Fields replied that he had not heard anything. He further testified that on the following morning Kelsey summoned him to his office, asked him if he went to the union meeting on the previous evening, and when Fields stated that he had, asked him who else was there. Fields' reply that he did not know concluded the conversation.

Superintendent Kelsey, whose testimony I have credited in other respects, tells a different story. He cites but one conversation with Fields, wherein Fields, on his

<sup>9</sup> The monthly volume of accumulated used seals was approximately 3,000. Superintendent Kelsey estimated the current resale rate for used lead to be 20 to 22 cents per pound.

<sup>10</sup> Henderson, it appears, was in the process of building a boat and had found some construction use to which this scrap lead could be put.

<sup>11</sup> I accept this admission by Anthony, corroborated as it is by Bush and substantially contrary to Anthony's interests herein. I do not otherwise credit Anthony's testimony except as it is similarly corroborated or shown to be contrary to his interest. He impressed me as an unreliable witness whose testimony is replete with hedging statements, confusion, and contradictions. Illustrative of this is his testimony immediately following the statement quoted above. Thus he testified that Bush "said, 'you take them and put them in the premix room'; but I didn't understand him to tell me not to take them home." Furthermore, Anthony could not seem to settle finally upon whether he took the last batch of lead from a small wooden box or from a trash can. This vacillation on a critical issue did little to instill confidence in Anthony's credibility. And as a final illustration, Anthony, testifying of his terminal interview with Bush, Kelsey, and Sales Manager Protiva, stated that he "wasn't paying too much attention [to what was being said], unless they were speaking directly to me." That statement and Anthony's answers to questions put to him by me concerning the meeting are incredible.

<sup>12</sup> At the close of General Counsel's case-in-chief Respondent moved to dismiss an allegation in the complaint wherein it was stated that by the reduction of rest periods Respondent had discriminated against certain of its employees in violation of Section 8(a)(3). In the absence of any evidence credible or otherwise that rest periods were curtailed for any motive or reason other than sound business considerations, I granted the motion and dismissed the allegation.

own initiative, called Kelsey and arranged a visit with him in Kelsey's office. Fields began the visit by stating "we had a union meeting last night," at which point Kelsey protested discussing the matter further and suggested that it was something that was entirely the affair of the employees.

The interrogation recounted by Fields and denied by Kelsey, if found by me to have occurred, would be the only evidence of involvement of this employer in the union affairs of its employees. As it stands thus in isolation I would of necessity be required to recommend that the complaint, insofar as it alleges a violation in this respect, be dismissed.<sup>13</sup> Accordingly, I find it unnecessary to resolve the dispute in the testimony of these two witnesses.

[Recommendations omitted from publication.]

<sup>13</sup> *Blue Flash Express, Inc.*, 109 NLRB 591.

**Employing Printers of Peoria<sup>1</sup> and Amalgamated Lithographers of America, Local No. 4, Petitioner. Case No. 13-RC-7341. March 23, 1961**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Gordon J. Myatt, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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, Leedom, and Fanning].

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.<sup>2</sup>

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.<sup>3</sup>

4. The appropriate unit:

The Petitioner seeks to sever a unit of lithographic production employees employed by certain members of the Employer from an overall unit of printing and lithographic production employees. The

<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> At the hearing, Peoria Printing Pressmen & Assistants' Union, Local No. 68, International Printing Pressmen & Assistants' Union of North America, AFL-CIO, herein called Pressmen, and Peoria Typographical Union No. 29, affiliated with International Typographical Union, AFL-CIO, herein called ITU, were allowed to intervene on the basis of a contractual showing of interest.

<sup>3</sup> The Pressmen contend that an existing contract between the ITU and Lohelde-Caswell Co., a member of the Employer, which was executed on November 1, 1958, to run until October 31, 1960, and which covers only Lohelde's employees, is a bar. Apart from any other considerations, we find that the contract would not be a bar because the petition, which was filed on August 4, 1960, was timely. See *Deluxe Metal Furniture Company*, 121 NLRB 995.