Redwing Carriers, Inc. *and* Charles Joseph Pailes and Francis Lowe. *Cases Nos. 12-CA-1574 and 12-CA-1722. August 15, 1961*

DECISION AND ORDER

On April 25, 1961, Trial Examiner Stanley Gilbert 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 Intermediate Report attached hereto. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices. Exceptions to the Intermediate Report and a supporting brief were filed by the Respondent.

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, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

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 Redwing Carriers, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against any employee in the hire or tenure of his employment for filing charges with the National Labor Relations Board.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them under Section 7 of the Act.

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

(a) Make Francis Lowe whole for lost earnings for the period from November 15 to 20, 1960, suffered as a result of the discrimination against him.

(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 records necessary to analyze the amount of backpay due under the terms of this Order.

[1] As no exceptions have been filed to the Trial Examiner's dismissal of the complaint with respect to Pailes' discharge, we adopt this finding *pro forma*.

(c) Post at its plant in Tampa, Florida, copies of the notice attached to the Intermediate Report marked "Appendix."[2] Copies of said notice, to be furnished by the Regional Director for the Twelfth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

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

[2] This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner" the words "Decision and Order." 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."

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding was heard before the duly designated Trial Examiner, in Tampa, Florida, on January 25 and 26, 1961. The issues litigated were (a) whether Redwing Carriers, Inc. (hereinafter referred to as Respondent), violated the National Labor Relations Act (hereinafter referred to as the Act) by allegedly discharging Charles Joseph Pailes for refusal to cross a picket line, and (b) whether it violated the Act by allegedly discharging Francis Lowe for filing charges under the Act. General Counsel and the Respondent waived oral argument but filed briefs.

Upon the entire record, and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE COMPANY

Redwing Carriers, Inc., a Florida corporation with place of business in Tampa, Florida, is engaged in the transportation of petroleum and other liquid products. During the 12-month period prior to the issuance of the complaint, which I find to be a representative period, Respondent derived revenue in excess of $100,000 from hauling products produced outside the State of Florida or destined for shipment to points outside said State. Therefore, I find, as admitted by Respondent, that it is now and has been at all times material to this proceeding an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE DISCHARGE OF PAILES

It is alleged that Respondent, on July 22, 1960, discharged Pailes, a truckdriver, because on that day he exercised his right to refuse to cross the picket line maintained in front of U.S. Phosphoric Products, Division of Tennessee Corp., Tampa, Florida, by the International Chemical Workers Union, AFL–CIO, Local 439, thereby violating Section 8(a)(3) and (1) of the Act. Even assuming that General Counsel proved that Pailes' discharge was so motivated, it does not appear that his discharge constituted a violation of the Act. Although Pailes testified to the effect that he feared he might be subjected to violence if he attempted to drive his truck across the picket line, the record fails to disclose any reasonable basis for

such fear. In *Redwing Carriers, Inc., and Rockana Carriers, Inc.*, 130 NLRB 1208, the Board in its Decision and Order clearly indicated that, in refusing to cross a picket line under circumstances similar to those existing herein, an employee engages in unprotected conduct.[1]

III. THE DISCHARGE OF LOWE

Lowe testified that he has been employed as a truckdriver by Respondent "about four years, off and on." On November 7, 1960, while in the employ of Respondent, Lowe filed with the Board an unfair labor practice charge against the Respondent alleging discrimination in the terms and conditions of his employment because of his union activities and because he gave testimony under the Act adverse to Respondent. According to his testimony in this proceeding, the discrimination consisted of "hard timing" him, in that he was given "poor runs" and "short runs." On November 14, 1960, Charles Mendez, president of Respondent, called Lowe into his office and inquired of him the basis for the charge. He told Mendez that James R. Cunningham, Respondent's chief dispatcher, who had accompanied Lowe into Mendez' office, was responsible for the treatment of which he had complained. Mendez sent Cunningham to get the payroll records which were examined and discussed. Lowe told Mendez that he had been given a disproportionate number of short trips and was thus required to work long hours in order to keep up his earnings. He admitted to Mendez that he had been falsifying his logbook in order to work longer hours and stated that "Everybody else did." Mendez told him to wait while he talked to Cunningham, but Lowe said he wanted to go home because he was sick and would call Mendez in the afternoon. When Lowe telephoned, later that day, he talked to Cunningham, who advised him to come to the plant the next day, but that before going to work he should talk to Mendez. The next day, November 15, he reported to work and saw Mendez, who, Lowe testified, said to him, "Well, I am going to lay you off indefinitely for lying on the log book. I have nothing else to say."

There is little variance between the testimony of Cunningham and Mendez and the testimony of Lowe with regard to the conversations on November 14 and 15, except that Cunningham and Mendez testified further that Mendez stated on November 14 that he would not tolerate anyone being discriminated against or lying on his log, and also that Lowe admitted that Cunningham might not have discriminated against him. It appears that Mendez asked Lowe if he were going to withdraw the charges he had filed, and that Lowe indicated that he would give it some thought.

Mendez further testified that he told Lowe that the "Wage and Hour people" had been checking on the Respondent and were in the process of bringing a suit against the Respondent and himself because the drivers' logs did not accurately reflect the trips made and hours spent. In the course of his testimony Mendez gave further details as to the aforementioned "suit" which he testified was filed in June or July 1960. He also testified that his attorney advised him that if the "Wage and Hour" on a recheck of Respondent's records found they were being properly kept "they would withdraw the suit." According to his testimony, on or about September 1, 1960, he ordered that a strict check be maintained on the accuracy of drivers' logs.

Although there is a considerable amount of testimony that it was a common practice among the drivers to falsify their logs even after September 1, 1960, and that it was done upon the instruction of the dispatchers, including Cunningham, or, at least with their knowledge, the record does not establish that Mendez was aware that the practice of falsifying logs continued after September 1, 1960. Since it was not Cunningham but Mendez who determined on November 15 to suspend or discharge Lowe, the issue is whether Mendez was motivated by Lowe's falsification of the logs, as contended by Respondent, or because Lowe filed charges with the Board, as contended by General Counsel. Therefore, the question of whether or not the dispatchers condoned or knew of the practice of falsifying logs does not appear to be material.

While I am not of the opinion that the record would permit an inference that Mendez was aware of the general practice of falsifying logs after September 1, and, therefore, could not have been moved to action by Lowe's admission of engaging in such practice, nevertheless I am convinced that the record supports the inference that Mendez' action was motivated by the fact that Lowe had filed charges with the Board. This conviction is based upon the credible testimony of Hugh B. McMurphy and Jerry S Milam, both employees of Rockana Carriers, apparently a sister corporation of Respondent with, to some extent, the same management, including Mendez.

[1] General Counsel's brief is silent with respect to the discharge of Palles

On or about November 15, 1960, McMurphy went into Mendez' office to obtain a loan from Rockana Carriers. He was accompanied by Milam who had agreed to cosign McMurphy's note. After arrangements were made for the loan, McMurphy testified that Mendez and Milam "got to talking." According to McMurphy's testimony, during the course of this conversation Mendez stated that Lowe was telling people that he had been fired for union activities which was not true, that "The reason why Lowe is where he is today, is when the loads got slack, not only on him but on everybody else . . . he thought we were being unfair to him, and he goes up and takes out an unfair labor charge." Milam testified that Mendez stated, "Yes, you can take that boy Lowe. As good as I have been to him, he slaps an unfair labor charge against me, and he told me that I couldn't fire him, but he is not with the company today." According to Milam, when he asked Mendez where Lowe was, Mendez replied that Lowe had been fired. Milam further testified that their conversation "lasted for about three hours."

Mendez denied discussing the matter of Lowe in the course of his meeting with McMurphy and Milam and that they were not in his office more than 15 or 20 minutes. On the other hand, Dorothy Milam, Milam's wife, testified that she accompanied McMurphy and her husband to the Respondent's offices and waited for them in an outer office for 2½ to 3 hours.

Based upon my observation of the witnesses (McMurphy, Milam, and the latter's wife) and in view of the consistency of their testimony, I am persuaded to discredit Mendez' denial that he made the statements with respect to Lowe to which McMurphy and Milam testified. It is my belief that these statements, made on the same day (or very shortly thereafter) that he told Lowe that the latter was laid off indefinitely, disclosed that by his action he intended to discharge Lowe and that he was motivated by the filing of the charges against Respondent. While it is possible that his statements might have been made for some desired effect and were not a true reflection of his intent and motivation, I do not find anything in the record which would justify drawing such an inference. Therefore, I am of the opinion that General Counsel has sustained the allegation that Respondent violated Section 8(a)(4) and (1) of the Act by discharging Lowe.

On November 20, while Cunningham was seated at the bar in a tavern called The Hitching Post, Lowe assaulted him. According to Lowe, he told Cunningham, who was facing toward him, to get out of the tavern and hit him twice on the side of the head. According to Cunningham, he did not see Lowe until after he was hit on the back of the head. Both testified that a Mr. Carter restrained Lowe from further violence, and that Cunningham said nothing and did not attempt to retaliate.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The unfair labor practice of the Respondent set forth in section III, above, occurring in connection with the operation of Respondent set forth in section I, above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tends to lead to labor disputes affecting commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in an unfair labor practice in violation of Section 8(a)(4) and (1) of the Act by discriminatorily discharging one of its employees for filing charges with the Board, I shall recommend that it cease and desist from such conduct and any other conduct violative of the rights guaranteed to its employees by Section 7 of the Act.

I do not, however, recommend that the remedy of reinstatement and backpay usually prescribed for discriminatory discharges be applied except to the extent indicated below. General Counsel indicated in the course of the proceeding that he did not, in view of the unprovoked assault by Lowe upon Cunningham, on November 20, 1960, request that Lowe be reinstated. I believe that, by his actions on November 20, Lowe, in effect, forfeited, as of that date, any rights he had to reinstatement and that to prescribe reinstatement or backpay after that date would not effectuate the policies of the Act. *Carthage Fabrics Corporation,* 101 NLRB 541, 553–555, *Renfro Hosiery Mills, Inc.,* 122 NLRB 929, 930. Accordingly, I will recommend that he be made whole for net loss of earnings only for the period from November 15 to 20, 1960. I do not believe it appropriate to deprive Lowe of all backpay in accordance with the withholding of such remedy in the *Renfro* case, *supra,* in view of the fact there was no previous threat of violence to which his act could be related. In the *Renfro* case the discharged employee threatened at the time his employment was terminated to exact physical retribution and eventually succeeded in accomplishing it. It does not appear that Lowe's attack on Cunningham was similarly premeditated.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The General Counsel has not sustained the allegation of the complaint that Respondent violated the Act by its discharge of Charles Joseph Pailes.
3. The General Counsel has sustained the allegations of the complaint that Respondent violated Section 8(a)(4) and (1) of the Act by its discharge of Francis Lowe.
4. The aforesaid violation of the Act is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL NOT discriminate against any employee in the hire or tenure of his employment for filing charges with the National Labor Relations Board, or in any other manner interfere with, restrain, or coerce our employees in the exercise of any of the rights guaranteed to them under Section 7 of the aforesaid Act.

WE WILL make Francis Lowe whole for any loss of pay he may have suffered for the period from November 15 to 20, 1960, as a result of the termination of his employment.

REDWING CARRIERS, INC.,
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.

Precrete, Inc. *and* Thomas Monahan, James Farrell, Alexander Chrust, Martin Flaherty, Robert Scharf, Robert Murfitt, George Bove, and Michael Reddy *and* Local 46, Wood, Wire and Metal Lathers International Union, AFL-CIO. *Cases Nos. 2-CA-7184-1, 2-CA-7184-2, 2-CA-7184-3, 2-CA-7184-4, 2-CA-7184-5, 2-CA-7184-6, 2-CA-7184-7, 2-CA-7184-8, and 2-CA-7184-9. August 15, 1961*

DECISION AND ORDER

On December 22, 1960, Trial Examiner W. Gerard Ryan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in and was not engaging in the unfair labor practices alleged in the complaint and recommending that said complaint be dismissed in its entirety, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel and the Respondent filed exceptions to the Intermediate Report, together with supporting briefs.