

Fine's Nearby Egg Corporation and Local 277, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 3-CA-1455 (formerly 2-CA-7341). August 31, 1961*

DECISION AND ORDER

On September 16, 1960, Trial Examiner C. W. Whittemore 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. 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 Brown].

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, the exceptions and brief, and the entire record in this case,¹ and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.²

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, Fine's Nearby Egg Corporation, Glen Wild, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 277, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization of its employees, by discharging, laying off, refusing to reinstate, or in any other manner

¹ The Respondent's request for oral argument is denied as the record, the exceptions, and the brief adequately present the positions of the parties.

² The Trial Examiner discredited Respondent's witness, Fine, as to his alleged plans, prior to the advent of the Union, to contract out all Respondent's trucking operations. The evidence indicates no more than a general and indecisive outlook by Respondent to continue its practice, when the pressure of business warranted, of employing independent truckers to supplement its own drivers and trucks. Respondent's reason for the discharge of the three drivers and assigning their routes to independent truckers (while continuing to use two or three of its own drivers) is shown, for example, in the credited testimony that Fine told one of the drivers he had been fired "because you went to the Union behind my back." The violations of Section 8(a)(3) and (1) and the remedy ordered herein are justified in any case on the clear evidence that Respondent discriminatorily selected the three drivers for discharge.

discriminating in regard to their 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 the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act, 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) Upon request, bargain collectively with Local 277, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the Respondent's employees in the unit found appropriate, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer employees Max Pressman, Vincent Schmidt, and Harold Robinson immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, resuming if necessary the operations suspended and make such employees whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(c) 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 for the determination of the amount of backpay due and the right of reinstatement under this Order.

(d) Post at its Glen Wild, New York, plant, copies of the notice attached hereto marked "Appendix."³ Copies of said notice, to be furnished by the Regional Director for the Third Region, shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof, and be maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

³ 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"

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

MEMBER RODGERS, dissenting:

I do not agree with my colleagues' finding that the Respondent violated the Act when it contracted certain of its trucking operations to independent truckers and discharged three of its drivers. Admittedly, the timing of the Respondent's actions and certain statements made to these three drivers when they were discharged offer support for my colleagues' finding when those factors are considered in isolation. However, under all the circumstances, I am of the opinion that the Respondent's actions were motivated by legitimate economic reasons.

The record establishes that prior to the appearance of the Union, the Respondent had been in financial difficulties, that it had searched for means to make its operations more economical and that it had decided to change its manner of doing business by contracting out its trucking operations. I think that a fair appraisal of the Respondent's conduct leads to the conclusion that the Respondent, already burdened with serious financial troubles, believed, and with good reason, that the Union meant increased costs and that an immediate move in the interest of economy was essential. This being the situation, I believe that the decision of the Court of Appeals for the Sixth Circuit in *N.L.R.B. v. J. M. Lassing, et al., d/b/a Consumers Gasoline Stations*, 284 F.2d 781, cert. denied 366 U.S. 909, is dispositive. There the court found that an employer did not violate the Act when, on the appearance of a union, it *accelerated* its plans to economize by contracting out its trucking operation. The court stated:

Fundamentally, the change was made because of reasonably anticipated increased costs, regardless of whether this increased costs was caused by the advent of the Union or by some other factor entering into the picture. This did not constitute discrimination against the three employees with respect to their tenure of employment because of membership in the Union

For the foregoing reasons, I would dismiss the complaint herein.

APPENDIX

NOTICE TO ALL 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, as amended, we hereby notify you that:

WE WILL NOT discourage membership in Local 277, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, or in any other labor organization of our employees, by discharging, laying off, refusing to reinstate, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any manner interfere with, restrain, or coerce employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right 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.

WE WILL offer Max Pressman, Vincent Schmidt, and Harold Robinson immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them.

WE WILL, upon request, bargain collectively with the above-named labor organization as the exclusive representative of our employees in the appropriate unit described below, and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

All truckdriver employees at the Glen Wild plant, exclusive of all other employees and all supervisors as defined in the Act.

FINE'S NEARBY EGG CORPORATION,
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
STATEMENT OF THE CASE

A charge having been filed and duly served, a complaint and notice of hearing thereon having been issued and served by the General Counsel of the National Labor Relations Board, and an answer having been filed by Fine's Nearby Egg Corporation, a hearing involving allegations of unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, was held in Monticello, New York, on July 28, 1960, before the duly designated Trial Examiner.

At the hearing all parties were represented by counsel and were afforded full opportunity to present evidence pertinent to the issues, to argue orally, and to file briefs. Argument was waived. Briefs have been received from General Counsel and the Respondent; the latter party also filed proposed findings. Except as consistent with findings made below, these proposed findings are rejected.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Fine's Nearby Egg Corporation is a New York corporation, having its principal office and place of business at Glen Wild, New York, where it engages in the processing, sale, and distribution of eggs.

During the year before issuance of the complaint it processed, sold, and distributed products valued at more than \$100,000, and such products valued at more than \$100,000 were shipped in interstate commerce from said plant to points outside the State of New York.

The Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 277, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization admitting to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

A. *Setting and issues raised by the complaint*

The chief issue is whether the Employer involved, Samuel Fine, fired a number of his truckdrivers on April 11, 1960, because they had joined the Charging Union and to avoid bargaining with the Union. The chief issue raised by the answer is whether Fine may avoid an obligation imposed by Congress by pleading business expediency.

All events relating to such issues occurred within 3 or 4 days after a majority of Fine's truckdrivers designated the Charging Union as their bargaining agent, and after a representative of Local 277 asked Fine to negotiate a collective-bargaining agreement.

B. *Events pertinent to the issues raised by General Counsel*

On Saturday, April 9, 1960, Business Representative Distini of Local 277 met with four of Fine's five or six truckdrivers.¹ All four signed application cards. The drivers and the business representative then went to Fine, where Distini told him the drivers had signed and asked to discuss a contract. Fine said he could not do so at the moment. Distini suggested that they meet the following Monday in New York City, with one Sam Hoffman, a stockholder of the corporation and with whom the Union had had other dealings. Fine finally agreed to meet with him there in the early afternoon of April 11.²

At the appointed time neither Hoffman nor Fine showed up. Distini telephoned Fine and asked what he was going to do to straighten things out. Fine replied that there was nothing to straighten out. Distini asked, "You mean you don't want to recognize the Union?" Fine answered, "No, there's nothing to talk about."

In a few words this depicts the demand and refusal to bargain—which in substance was admitted by Fine as a witness. Although Fine had avoided keeping the appointment, he was not idle on Monday. Without previous warning he fired at least three of the four drivers who had signed union cards.

Undisputed testimony of the drivers involved establishes that:

(1) When driver Max Pressman returned to the plant shortly before noon on April 11, after picking up eggs, Fine met him and asked if he had signed up in the Union. Pressman replied that all four had. Fine then declared, "This is your last day here,

¹ General Counsel claims five drivers; as noted below Fine claimed at the hearing there were six.

² That Fine agreed to the time and place is based upon Distini's credible testimony and the inherent probabilities of the situation. Fine's testimony, which the Trial Examiner cannot fully credit for reasons revealed later in this report, is to the effect that Distini wanted to meet with Hoffman, not himself.

because I don't recognize the Union. . . . You should have come to see me first. I am going to only keep three drivers. . . . When the other boys come in, you can talk it over with them."

(2) Pressman told driver Vincent Schmidt of Fine's action as soon as that employee came in from his pickups. The two were then sent to the office, where Fine gave them each 1 day's pay—their regular pay having been given them as usual the preceding Friday. Fine told them, "I won't be needing you any more . . . I am going to contract out the hauling."

(3) When driver Harold Robinson came to the plant shortly after the discharge of Pressman and Schmidt, he was told to go to the office and get his pay from the bookkeeper. He did so. The next morning he approached Fine, who told him he was fired "because you went to the Union behind my back."

(4) Driver H. Bolduc who, like the three named above, had signed a union application, was also given his pay that Monday afternoon without explanation. That night, this employee telephoned Fine, and told him that although he had signed a card he did not care about the Union. He was told to return to work the next morning and has been employed by Fine since then.³

C. The Respondent's case

In view of the undisputed evidence upon which the above findings rest, it would appear that the complaint is fully sustained as to both the issue of discriminatory discharges and that of refusal to bargain.

Without encumbering this report with all details and figures offered in evidence through his counsel, in substance it is Fine's contention that he fired his drivers because he believed it would be, and later experience proved it to be, cheaper to have his eggs hauled by independent contractors.

As to the motive for his admitted discharge of the three drivers, it seems rudimentary logic to consider that whatever savings he may have made *after* April 11 could not have been a factor in any determination he may have made *before* that date.⁴

And Fine's varied and inconsistent claims as to earlier plans cast grave doubt upon his credibility. For example, the answer states that "for several years prior to and up to April 9, 1960," the Respondent "had been attempting to arrange a better method of transporting its product to market . . . and had been negotiating with several trucking companies. . . ." According to Fine's testimony, however, his business operations did not start until December 1958, and in answer to his counsel's query as to when he *started to consider* such a move, he replied, "About a year ago from today." Also as a witness Fine said that he *first* made actual investigation of having independent contractors haul for him in "the winter of '59-'60." Again, on direct examination Fine claimed that he *concluded* arrangements with one contractor *before* April 9, when the Union came to him. On cross-examination he admitted that he *first contacted* this trucker "about the first of May"—which was long after he had fired his employees.

Again, as a witness he claimed he had made final arrangements with another independent trucker "about the beginning of March." In a sworn statement made on April 26 to a Board representative, Fine declared that such final arrangements were not made until April 5.

Fine admitted candidly that although he had intended to have one trucker start on April 15, "when the union came up and I saw I was going to have some trouble, I told him (this trucker), I said, 'You better start right now (April 11) because I can't wait any longer.'"

Even if it were possible to give full credit to Fine's vacillating testimony, the above-quoted admission establishes that at least for a period of 4 days he violated the Act as alleged.

Finally, Fine's admission on cross-examination that as to one such independent trucker—Burns—no arrangement or agreement as to price for this service was made

³ Bolduc was a most reluctant and evasive witness. At first he claimed he could remember nothing, but when confronted with his statement to a Board agent he finally admitted the nature of his call to Fine. He claimed, however, that Fine had told him on Monday afternoon to be at work the next day, and before his call that night. The claim is patently false. Had he been told to be at work the next day, there would have been no reason to call Fine that night.

⁴ Furthermore, the Trial Examiner is not aware that the courts are inclined to condone an unlawful act merely because its perpetration has proved profitable.

until the service *began* proves that there was small factual basis for his claimed anticipation of economic savings.

Under the circumstances described above, the Trial Examiner can place no reliance upon Fine's various claims, and finds no merit in them.

D. Conclusions as to the discharges

On the basis of the foregoing findings of fact the Trial Examiner concludes and finds that Fine discriminatorily discharged employees Pressman, Schmidt, and Robinson on April 11, 1960, to discourage union membership and activity, and that by such discrimination and by Fine's interrogating Pressman the same day as to whether he "signed" with the Union, the Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed by the Act.

E. Conclusions as to the refusal to bargain

Nature of the work performed by the truckdrivers employed by the Respondent fully supports the complaint's allegation that:

All truckdriver employees of Respondent employed at its Glen Wild plant, exclusive of all other employees and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Although the answer denies the allegation, no evidence was adduced by the Respondent to support its denial. The Trial Examiner therefore concludes that the unit as alleged in the complaint is appropriate for the purposes above set forth.⁵

According to Fine's testimony, on April 9, 1960, there were six truckdrivers employed by him.⁶ Credible evidence shows that on that date four of them signed union cards. A majority having so designated the Union, it is concluded that on that date and at all times thereafter the Union was and now is the exclusive bargaining representative of all employees in the said unit.

The Trial Examiner concludes, finally, that on April 11, 1960, the Respondent refused to recognize and bargain with the Union, as was its legal obligation, by discharging the three employees named herein and by declining to meet the union representative for negotiations, following the Union's effective claim of majority and demand to bargain. Such refusal constituted interference, restraint, and coercion of employees in the exercise of rights guaranteed by 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 the operations of the Respondent 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 unfair labor practices the Trial Examiner will recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It will be recommended that the Respondent, upon request, bargain collectively with Local 277, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of employees in the appropriate unit described herein, and, in the event an understanding is reached, embody such understanding in a signed agreement.

In accordance with Board policy set forth in *The R. C. Mahon Company*, 118 NLRB 1537 at 1544,⁷ and cases cited therein, it will be recommended that the Respondent resume its customary operations, and offer to the three employees discriminatorily discharged immediate and full reinstatement to their former or sub-

⁵ See *Tennessee Egg Company*, 110 NLRB 189

⁶ Fine listed them as Robinson, Schmidt, Pressman, Gries, Bolduc, and Fuchs. He said he discharged the first three and retained the latter three. According to Fine, also, he discharged Gries a few days before the hearing opened. It therefore appears that at the time of the hearing there were still two employees in the unit.

⁷ As in the *Mahon* case, the delivery operation is still required, although a good part of it is being accomplished by independent truckers, but *not under contract*.

stantially equivalent positions, without prejudice to seniority or other rights and privileges. It will be further recommended that the Respondent make them whole for any loss of pay suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to that which he would normally have earned as wages, absent the discrimination from April 11, 1960, to the date of the Respondent's offer of full reinstatement, less their net earnings during said period and in a manner consistent with Board policy set out in *F. W. Woolworth Company*, 90 NLRB 289, and *Crossett Lumber Company*, 8 NLRB 440. It will also be recommended that the Respondent, upon request, make available to the Board and its agents all payroll and other records pertinent to the analysis of the amounts of backpay due and the right of reinstatement.

Since the violations of the Act which the Respondent committed are related to other unfair labor practices proscribed by the Act, and the danger of their commission in the future is reasonably to be anticipated from its past conduct, the preventive purposes of the Act may be thwarted unless the recommendations are coextensive with the threat. To effectuate the policies of the Act, therefore, it will be recommended that the Respondent cease and desist from infringing in any manner upon the rights guaranteed employees by the Act.

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. Local 277, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminating in regard to the hire and tenure of employees, thereby discouraging membership in the above-named labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

3. All truckdriver employees of the Respondent employed at its Glen Wild plant, exclusive of all other employees and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. On April 9, 1960, and at all times since that date, the above-named labor organization has been and now is the exclusive bargaining representative of all employees in the above-described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, by virtue of Section 9(a) of the Act.

5. By refusing, on April 11, 1960, and at all times thereafter, to bargain collectively with the aforesaid labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. 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.]

Greene County Farm Bureau Cooperative Association, Inc. and Sales Drivers, Sales and Service Local No. 176, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 9-CA-2238. August 31, 1961*

DECISION AND ORDER

On March 16, 1961, Trial Examiner Stephen S. Bean issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recom-