

& Wilcox Company, 351 U.S. 105, where the Court stated that "no restriction may be placed on the employees' right to discuss self organization among themselves (during nonworking time), unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corporation v. N L.R.B.*, 324 U.S. 793, 803." In *Walton Manufacturing Company*, 126 NLRB 697, the Board interpreted the *Republic Aviation*, *Babcock & Wilcox*, and *Nutone* cases as establishing, among other things, a rule that no-solicitation rules which prohibit solicitation by employees on company property during their nonworking time are presumptively invalid as to their promulgation and enforcement; but that, however, such rules may be validated by evidence that special circumstances make the rule necessary to maintain production or discipline. There is no suggestion in the instant case that the rule in question relates to discipline or production in any way.

I find that by announcing and enforcing a rule prohibiting employees from engaging in union activities and soliciting union membership on company premises during nonworking time, including lunch periods and coffee breaks, Respondent has interfered with, restrained, and coerced employees in the exercise of their statutory rights within the meaning of Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its business 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

It having been found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of 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. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Union of Electrical, Radio, and Machine Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By engaging in the conduct set forth in section III, above, Respondent interfered with, restrained, and coerced its employees and has 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.]

Marathon, a Division of American Can Company and Thomas G. DeSantis, Sr. and Independent Oswego Printing Pressmen and Helpers Union

Oswego Printing Pressmen and Assistants' Union No. 341, International Printing Pressmen and Assistants' Union of North America, AFL-CIO and Thomas G. DeSantis, Sr. Cases Nos. 3-CA-1517 and 3-CB-485. November 7, 1961

DECISION AND ORDER

On May 26, 1961, Trial Examiner Sidney Sherman issued his Intermediate Report in the above-entitled proceeding, finding that the

Respondent Employer had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, and that the Respondent Union had not engaged in and was not engaging in certain unfair labor practices and recommending that the complaint be dismissed as to it, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel and the Respondent Employer filed exceptions to the Intermediate Report and supporting briefs.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with these cases 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 no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in these cases, including the Intermediate Report, the exceptions, and briefs. The Board finds merit in the Respondent Employer's exceptions and therefore adopts the Trial Examiner's findings, conclusions, and recommendations only to the extent they are consistent herewith.

The Trial Examiner found that the Respondent Union succeeded to and was entitled to the rights of the Independent under the 1959 contract with the Respondent Employer. This contract included the union-shop clause which the Trial Examiner found to be valid. In the absence of exceptions to these findings, and as a basis for our decision herein, we adopt them.

The record, according to the credited testimony, shows that DeSantis, the alleged discriminatee met with Johnson, who was in charge of labor relations at the Respondent Employer's plant, on September 20, 1960. DeSantis produced a letter from the Respondent Union demanding that he pay his dues and initiation fee delinquency by September 27, and stating that if the delinquencies were not removed a request would be made for his discharge in accordance with the contract. DeSantis asked Johnson if he was required to pay dues to the Respondent Union and was told that a request for his discharge had already been received and had been referred to superior authority. Johnson told DeSantis that the Respondent Employer did not recognize the Respondent Union, but only the Independent. It appears, however, that this statement was made in context with Johnson's explanation that he was not aware of the exact status of the Independent's affiliation action, and that the issue of the Union's status had been referred to the Employer's home office, for resolution at that level. Moreover, as Johnson so testified, Johnson tried to impress DeSantis

¹ The Respondent Employer's request for oral argument is hereby denied as the record, including the exceptions and briefs, adequately present the issues and positions of the parties

with the fact that DeSantis "should join the Union like everyone else. . . ." Later on the same day, DeSantis arranged a meeting with two officers of the Respondent Union. DeSantis offered to pay any dues owed by him to the Independent and refused to make any payment to the Respondent Union unless shown proof that he was legally obligated to do so. No attempt was made to furnish him with such proof.

The heart of the Trial Examiner's finding against the Respondent Employer is his conclusion that Johnson's statements to DeSantis were calculated to lead him to believe that the Respondent Employer recognized only the Independent, and that the Respondent Employer should therefore be stopped from justifying the discharge because of DeSantis' nonpayment of dues to the Respondent Union. We disagree. A necessary element of estoppel is reliance upon representations made to the injured party to his detriment. We believe that this element of reliance is not present here. After his meeting with Johnson, DeSantis arranged a meeting with officers of the Respondent Union. Notwithstanding the fact, according to the Trial Examiner, that DeSantis was led to believe that the Respondent Employer recognized only the Independent and that his financial obligations ran only to that organization, DeSantis requested proof of the Respondent Union's officers that his obligations ran to that union. It is apparent, in spite of what Johnson told him, DeSantis was not satisfied that the Respondent Employer recognized only the Independent and that his obligations were due solely to it. Putting it another way, DeSantis did not rely upon what Johnson told him. Under the circumstances, it cannot be said that DeSantis was misled by the Respondent Employer into not meeting his financial obligations.

Moreover, we are not persuaded that DeSantis was entirely innocent in the circumstances of this case. Both in his testimony in this hearing, and in his conversations with both the Respondents, DeSantis showed that he was quite knowledgeable concerning the technicalities of union recognition; he also showed a great concern as to where his *legal* obligations lay in making dues and initiation payments. Further, since July 1958, with brief exception, DeSantis had successfully avoided joining either the Independent or its successor, the Respondent Union, notwithstanding his obligations to join a union by virtue of the contracts between the Respondent Employer and the unions.

Under established law, a union is privileged to demand and an employer is privileged to effect, the discharge of an employee for nonpayment of dues and initiation fees pursuant to a valid union-shop agreement. Thus, the discharge of DeSantis was privileged as to both Respondents herein. Indeed, the Trial Examiner so found as to the Respondent Union. We find that under the circumstances of this case, the Respondent Employer, too, was privileged in effecting the

discharge of DeSantis at the request of the Respondent Union. Accordingly, we will order that the complaint here be dismissed as to the Respondent Employer as well as to the Respondent Union.

[The Board dismissed the complaint.]

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This case was heard at Oswego, New York, on April 11, 1961, upon a complaint filed by the General Counsel and answers filed by all Respondents. The issue litigated was whether the Respondents violated the Act with respect to the discharge of Thomas DeSantis.¹

Upon the entire record and my observation of the witnesses, I adopt the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE COMPANY

Marathon, a Division of American Can Company, hereinafter referred to as the Company, a corporation organized under the laws of New Jersey, maintains its principal office and plant at Oswego, New York, where it is engaged in the manufacture and sale of cartons and other paper products. The Company annually ships to, and receives from, out-of-State points products worth more than \$1,000,000.

I find that the Company is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS

Independent Oswego Printing Pressmen and Helpers Union, hereinafter called the Independent, was, during the term of its existence, a labor organization within the meaning of Section 2(5) of the Act. Oswego Printing Pressmen and Assistants' Union No. 341, International Printing Pressmen and Assistants' Union of North America, AFL-CIO, hereinafter called Local 341, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The complaint alleges that on September 28, 1960, the Independent and Local 341 caused the Company to discharge DeSantis because of his failure to pay dues and initiation fees to Local 341, and that by such conduct the Independent and the Local violated Section 8(b)(2) and (1)(A) of the Act, and the Company, by discharging DeSantis, violated Section 8(a)(3) and (1) of the Act.

The Respondents admit the acts alleged in the complaint but contend that DeSantis' discharge was lawful because it was authorized by the terms of a union-security clause in their collective bargaining contract.

To understand the issues herein it may be helpful to review the labor relations history of the instant plant. The plant employs about 50 pressmen and an unspecified number of other categories of employees engaged in production and maintenance work. Prior to June 1958, all these employees were represented in a plantwide unit by a union designated in the record as "the Pulp and Sulphite Workers,"² of which DeSantis was secretary-treasurer. In June 1958 an election was held, upon the petition of the Independent, to determine whether the pressmen wished to be represented in a separate unit by the Independent.³ The election was won by the Independent and it was certified on June 26, 1958, as the representative of the pressmen.

¹ Hereinafter referred to as DeSantis. Francis DeSantis, also involved herein, will be designated by his full name. The two are not related.

² See next footnote.

³ The Board's files in the representation case (Case No 3-RC-1990) show that the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, and its Local Union No 359, and the International Brotherhood of Paper Makers, AFL-CIO, and its Local No 254, all intervened jointly in that case and appeared on the ballot in the election. (The Board's Decision and Direction of Election therein is not officially reported.)

Among the officers of the Independent at that time were Francis DeSantis, president, and Doersam, secretary-treasurer.

In July 1958, the Company executed a contract with the Independent which contained a union-shop clause. A new contract, with a similar clause, was executed in July 1959, for a term of 2 years. This contract expressly provided that, if during the term of the agreement the Independent changed its affiliation "without effecting a change in the bargaining representative," the Company would continue "to recognize the Union as the bargaining representative" and the agreement would continue in full force and effect for its entire term. On August 8, 1959, the membership of the Independent voted to affiliate with the International Printing Pressmen and Assistants' Union of North America, AFL-CIO. In October 1959, the Independent was dissolved, all its assets were transferred to the newly formed Local 341, and all the members of the Independent joined Local 341. The General Counsel does not challenge the legality of this affiliation action nor deny that Local 341 was, at least *prima facie*, entitled to all the rights of the Independent under the foregoing contract.⁴ In any event, I find that under the "successorship clause" of the contract quoted above this Company was bound to recognize Local 341 after the dissolution of the Independent.⁵ It is undisputed that DeSantis failed to comply with the union-shop requirements of the 1959 contract, and was for that reason discharged by the Company. I find, nevertheless, that such discharge was unlawful.

The 1958 Contract

It is undisputed that after the certification of the Independent in June 1958 and the execution of the 1958 contract, DeSantis made some efforts to comply with the union-shop requirements of that contract. There is conflict only as to the extent of such efforts. It is clear that he offered to join the Independent sometime in September 1958. The offer was at first rejected on the ground that the grace period in the 1958 contract had already expired. As to what happened thereafter, there is sharp disagreement in the testimony. According to Doersam, the Independent's secretary-treasurer, a few hours after the rejection of DeSantis' application, Doersam offered to accept it, but DeSantis announced that he no longer desired to join. However, according to DeSantis, he at no time withdrew his application and, in fact, paid the Independent \$4, representing the dues for August and September 1958, ceasing to pay dues only after he was told by Francis DeSantis that he had been "voted out" of the Independent. Doersam admitted that DeSantis had paid \$4 for August and September, but asserted that DeSantis paid this amount in effect as "support money" and not as membership dues. Francis DeSantis also testified that his namesake persistently refused to join the Independent and was for that reason barred from attendance at meetings of the Independent. I do not deem it necessary to resolve these and other conflicts in the testimony relating to DeSantis' dealings with the Independent, as such transactions would in my opinion shed little light on the principal issue herein—the legality of DeSantis' discharge in September 1960 for failure to pay dues to the Independent's successor, Local 341. Suffice it to say that, whatever version is accepted, it is clear that DeSantis' application for membership in the Independent was on one occasion rejected, that he nevertheless paid \$4 to the Independent either as dues or support money, that he was in October 1958 barred from attending membership meetings, and that he thereafter made no further payments to the Independent. It is clear also that the Independent did not request his discharge under the union-shop clause of the 1958 contract.

The 1959 Contract

We turn now to the events bearing more directly on DeSantis' discharge on September 28, 1960. As already stated, in October 1959, the Independent was dissolved and all its assets and membership transferred to the newly formed Local 341.

⁴ The General Counsel does contend, however, that Local 341, after its formation, relinquished its rights under the contract to the Independent, notwithstanding the latter's defunctness. I find no merit in this contention.

⁵ The Board has frequently held that, even absent such a successorship clause as is here involved, a mere change in affiliation by a contracting union does not affect its rights under the contract. E.g., *Textron, Inc.*, 119 NLRB 737; *Waterway Terminals Corporation*, 120 NLRB 1788. While there is evidence in the record that Local 341 admitted to membership employees in another plant, it is not clear that the Independent did not also admit such other employees to membership. In any event, the General Counsel does not contend, and I do not believe, that, even if Local 341, unlike the Independent, represented employees of another employer, as well as those of the Company, that fact would affect its entitlement to the benefits of the 1959 contract.

In January 1960, Francis DeSantis, the former president of the Independent, took office as president of Local 341 for a term of 1 year, and Doersam was installed as secretary-treasurer of Local 341. Also, in January 1960, Francis DeSantis urged his namesake to join Local 341, and in February 1960 the latter did join the Local. However, of the total amount of about \$28 demanded of him at that time, he paid only about \$15, promising to pay the balance at a later date. Local 341 remitted to the International the full amount of \$28, advancing about \$12 from its own treasury for that purpose. However, DeSantis did not thereafter pay any dues and refused to reimburse Local 341 for the moneys it had advanced on his account. On August 29, Local 341 wrote a letter to Johnson, who was in charge of labor relations at the instant plant, requesting DeSantis' discharge for failure to meet his financial obligations to Local 341. Johnson deferred action on this letter until September 28, 1960, when he advised DeSantis by letter of his discharge.

It may not be amiss to interpolate at this point some comments on the relations between the Company and Local 341 during this period. Although the Independent had become Local 341 in October 1959, the Company continued to remit check-off dues to Doersam as secretary-treasurer of the Independent, by draft made out to that union. The draft was endorsed by Doersam to Local 341 and deposited to its account. At the hearing Johnson testified that he was aware that an "affiliation move" was under way but that as late as September 1960 he did not know to what stage the affiliation had progressed.⁶ Johnson explained that, in administering the 1959 contract, he dealt throughout with the same representatives of the employees, that the question of the official designation of the bargaining agent under that contract never arose, and that, as far as he knew, the Independent was at all times the only representative of the pressmen in the plant. Moreover, although Local 341 made it clear in its request to Johnson for DeSantis' discharge that the Independent had been transformed into Local 341 and that DeSantis' financial obligation was to that Local, Johnson nevertheless notified DeSantis in his letter of September 28, that he was being discharged at the request of the *Independent*, and the letter bears the notation that a copy thereof had been sent to the *Independent*. The record shows also, that as late as December 1960, Doersam sought to enlist the aid of the Board in obtaining acceptance by the Company of Local 341 as the official designation of the bargaining agent.⁷

It is evident from the foregoing that prior to August 29, 1960, the Company was not certain of the exact status of the affiliation action, and, even after Local 341 advised it in detail of such action in the August 29 letter, Johnson persisted in identifying the Independent as the bargaining agent for the pressmen, and in treating it as the only pressmen's union in the plant.

This confusion on the part of the Company as to the status of Local 341 takes on special significance in appraising certain testimony relating to an interview between Johnson and DeSantis on September 20, about a week before his discharge. DeSantis sought this interview after receiving a letter dated September 17, 1960, from Local 341 warning that, unless by September 27, he made up his delinquency in dues and initiation fees, the Local would request his discharge in accordance with the contract. At this interview DeSantis asked Johnson if he was required to pay dues to Local 341 to avoid discharge. Johnson volunteered that Local 341 had already asked for DeSantis' discharge and that Johnson had referred the matter to his superiors in Menasha, Wisconsin, and was awaiting a reply. According to DeSantis, Johnson then stated that the Company did not recognize Local 341 but only the Independent. Johnson denied at the hearing that he had disclaimed recognition of Local 341, explaining that he had merely pointed to the 1959 contract originally executed with the Independent, which was lying on his desk, and had said, "This is our contract." However, Johnson admitted telling DeSantis that Johnson was not aware of the exact status of the Independent's affiliation action. Accordingly, from Johnson's own testimony it is clear that his statements to DeSantis were reasonably calculated to lead him to believe that the Company recognized only the Independent. Moreover, I credit DeSantis' testimony that Johnson expressly denied recognizing Local 341.⁸

⁶ Other inconsistent testimony by Johnson that he knew that the affiliation had been "consummated" was stricken upon objection of counsel.

⁷ Recognition by the officers of Local 341 of its equivocal status in the eyes of the Company is further reflected in the letter of August 29 to Johnson requesting DeSantis' discharge. Although the letter carefully sets forth the affiliation action and the demise of the Independent, it is signed by Francis DeSantis and Doersam as officers of *both* the Independent and Local 341.

⁸ Such denial is consistent with the Company's action in continuing to remit checked-off dues to the Independent and Johnson's own references to the Independent in his discharge letter of September 28.

Later on the same day, DeSantis arranged a meeting with Francis DeSantis and Doersam. According to DeSantis he offered to pay any dues owed by him to the Independent, but refused to make any payment to Local 341 unless he was shown proof that he was legally obligated to do so, and no attempt was made to furnish him with such proof. However, according to the Local's officers, DeSantis merely asserted that he had a check with him and could pay what he owed Local 341, but refused to do so, pointing out certain alleged defects in the Local's letter to him. I am constrained to resolve this conflict in testimony in favor of DeSantis. It seems strange that he would arrange a meeting with the officers of Local 341, as they in effect testified, solely for the purpose of announcing his refusal to pay dues. DeSantis' version, on the other hand, seems the logical sequel of his conversation with Johnson, in which, as found above, Johnson in effect contradicted Local 341's claim to be the beneficiary of the union-shop clause in the 1959 contract. Moreover, DeSantis' account of his offer to pay dues to the Independent rings true when one considers that Johnson had just told him in effect that the Independent was still the incumbent union.

As already related, on September 28, 1960, about a week after the foregoing events Johnson notified DeSantis by letter of his discharge effective that date, *at the request of the Independent Union*.

I have no doubt that DeSantis was reluctant to meet his financial obligations to Local 341. However, I also have no doubt that he was even more anxious to avoid discharge and was prepared to pay whatever was legally required of him in order to keep his job.

It appears to be Respondents' position that DeSantis was not actually misled by Johnson but was aware of the true relation between the Independent and Local 341. DeSantis, however, asserted at the hearing that he believed that both Unions existed in September 1960 as separate entities. Although Respondents' witnesses stressed DeSantis' legalistic approach to his union obligations, and imputed to him considerable sophistication in labor relations matters, there was no evidence that DeSantis had read the 1959 contract⁹ or was familiar with the "successorship clause" therein. Moreover, as he had been barred from the Independent's meetings since October 1958, he could not have had any first-hand knowledge of the Independent's dissolution or of its transformation into Local 341, nor was there any evidence as to what other information he had on this point. In any event, whatever hearsay information regarding the change in affiliation may have come to his attention, he may reasonably have discounted. In sum, I find insufficient basis in the record for denying credit to DeSantis' testimony that he thought that both unions existed in September 1960 as separate entities. In view of the Company's own confusion about the relationship between the two Unions, despite the explicit advice contained in the letter of August 29, I am unable to find that such belief on the part of DeSantis was unreasonable.

In view of the foregoing, I find that the Company caused DeSantis reasonably to believe that the Independent was in September 1960 the only recognized representative of the pressmen and that he was not required to meet his financial obligation to Local 341 in order to retain his job under the union-shop clause in the 1959 contract. I find therefore that this conduct of the Company deterred DeSantis from exercising his right to forestall discharge by making up his delinquency,¹⁰ and that the Company is therefore estopped from pleading the union-shop clause in its contract as a defense to the discharge.¹¹ It follows that by discharging DeSantis the Company violated Section 8(a)(3) and (1) of the Act.¹²

As it is clear from the record that the Independent has not been in existence since October 1959, I will recommend that the complaint be dismissed with respect to the Independent.

⁹ DeSantis admitted that he had been present at a meeting of the Independent in September 1958, when the 1958 contract was read to the members. That contract did not contain the same "successorship clause" as the 1959 contract.

¹⁰ See *Aluminum Workers International Union, Local No 135, AFL (The Metal Ware Corporation)*, 112 NLRB 619, enfd 230 F 2d 515 (C.A. 7).

¹¹ *Busch Kredit Jewelry Co., Inc.*, 108 NLRB 1214; *Pacific Transport Lines, Inc.*, 119 NLRB 1505, enforcement denied 290 F 2d 14 (C.A. 9).

¹² Other possible bases for finding DeSantis' discharge unlawful are suggested by the record but are not relied upon here because not alleged in the complaint or adequately litigated. Thus, the record indicates that Local 341 demanded various payments of DeSantis, which it seems arguable, were not authorized by the 1959 contract nor by the proviso to Section 8(a)(3) of the Act and the Local demanded his discharge because of his failure to make such payments (i.e. a "day's pay" assessment, a registration fee, an initiation fee in excess of that charged to other members, and a reinstatement fee). The

With regard to the liability of Local 341, a difficult question is presented. It is true that it caused the Company to discharge DeSantis, which discharge I have found to violate Section 8(a)(3) and (1) of the Act. However, the latter finding is based solely on acts of the Company creating an estoppel against it. I have already found that Local 341 was entitled to all the rights of the Independent under the 1959 contract, including the union-shop clause. The General Counsel concedes that the Local requested DeSantis' discharge because of his failure to pay dues and initiation fees. Accordingly, such request must be deemed to be lawful, under the Act, unless Local 341, like the Company, was guilty of conduct which estops it from relying on the union-shop clause in the contract. However, it is clear that, unlike the Company, Local 341 made no affirmative representation to DeSantis which would lead him to believe that any union other than Local 341 was entitled to invoke the union-shop clause in the contract. On the contrary, Local 341 asserted in its letter to DeSantis of September 17 that unless he paid his indebtedness to it, it would seek his discharge pursuant to the union-shop clause in the existing contract. Moreover, in its letter of August 29 to the Company, requesting DeSantis' discharge, Local 341 explained in some detail the relationship between the Independent and Local 341. It does not appear that there was anything else that Local 341 could have done that would have persuaded the Company that Local 341, rather than the Independent, was entitled to invoke the union-shop clause, or that would have sufficed to dispel the impression conveyed to DeSantis by Johnson that the Company still recognized the Independent alone. DeSantis testified that, when he asked the representatives of Local 341 on September 20 for proof of the Local's recognition, he would have been satisfied had he been shown a Board certification of Local 341 or a letter from the Company to Local 341 granting it recognition. However, it was not within the power of Local 341 to produce either such document, as it had not been certified and was claiming only under the successorship clause in the 1959 contract and the Company was at that time still uncertain of the Local's legal status. As it appears that nothing short of such proof would have satisfied DeSantis, and as such proof was not available through no fault of Local 341, I cannot find any estoppel against it, and will recommend dismissal of the complaint with respect to it.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent Company set forth in section III, above, occurring in connection with its 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

It having been found that the Respondent Company engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company discriminated with regard to the hire and tenure of employment of Thomas DeSantis on September 28, 1960, the duly designated Trial Examiner will recommend that it offer him immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and make him whole for any loss of pay suffered as a result of the discrimination against him, by payment of a sum of money equal to the amounts he would have earned from the date of the discrimination to the date of the offer of reinstatement, less net earnings to be computed on a quarterly basis in a manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289. Earnings in any one quarter shall have no effect upon the backpay liability for any other such period. It will also be recommended that the Company preserve and make available to the Board, upon request, payroll and other records to facilitate the computation of the backpay due.

In view of the peculiar circumstances of this case, I do not believe that the discharge of DeSantis evinces any disposition by the Company to infringe generally

1959 contract conditions employment only upon payment of dues and "initiation fees" and makes no reference to reinstatement fees. Whether the other items listed above in the parentheses may be deemed proper initiation fees under the contract or the Act are matters which I do not decide for reasons already stated.

on employee rights under the Act. Accordingly, I shall not recommend the usual "broad" cease-and-desist order.

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. By discriminating in regard to the hire and tenure of employment of Thomas DeSantis, thereby encouraging membership in a labor organization, the Company has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

2. 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.]

Union Transfer & Storage Company and General Drivers, Warehousemen and Helpers Local Union No. 968. *Cases Nos. 23-CA-1000 and 23-RC-1511. November 7, 1961*

DECISION AND ORDER

On February 28, 1961, Trial Examiner John C. Fischer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the Intermediate Report attached hereto. The Trial Examiner further found that the challenged ballots of the alleged discriminatees were invalid. Thereafter, the General Counsel and the Charging Party filed exceptions to the Intermediate Report with supporting briefs. The Respondent filed a brief in support of the Intermediate Report.

The Board¹ has reviewed the rulings made by the Trial Examiner at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, with the single exception² noted below.

[The Board dismissed the complaint.]

¹ Pursuant to Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Rodgers and Leedom].

² We do not adopt the Trial Examiner's finding that a Houston ordinance prohibited smoking in the Respondent's warehouse.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon charges filed by General Drivers, Warehousemen and Helpers Local Union No. 968, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for the Twenty-third Region, Houston, Texas, 134 NLRB No. 4.