

Ablon Poultry & Egg Company and Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local No. 540

Ablon Poultry & Egg Company and Dallas General Drivers, Warehousemen and Helpers Local Union No. 745 and Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local No. 540, Joint Petitioners. Cases Nos. 16-CA-1444 and 16-RC-2783. November 29, 1961.

DECISION AND ORDER

On April 17, 1961, Trial Examiner John H. Dorsey issued his Intermediate Report in the above-entitled proceeding, finding that Respondent had not engaged in and was not engaging in unfair labor practices and recommending that the complaint be dismissed and the objections to the election be overruled, as set forth in the Intermediate Report attached hereto. Thereafter the General Counsel 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 [Chairman McCulloch and Members Rodgers and Leedom].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and, except as noted below,¹ finds that no prejudicial error

¹ At the hearing, the General Counsel offered in evidence a letter dated January 12, 1961, from Respondent's counsel to the Regional Director explaining the reasons for Middlebrook's discharge. The letter stated:

With reference to the discharge of Ruby Lee Middlebrook, it may be noted that poultry is sent into the plant by truck and that some of the trucks are delayed and the employees sometimes have to wait until the delivery of the truck. About a week previous to the election this occurred, and Ruby Lee Middlebrook, as the trucks were coming in and being unloaded, carried off a number of employees in her car with the statement that if the employees had to wait on the company the company could wait on the employees, thereby causing a delay in the line and a great expense to the employer. This was a willful walkout on her part, which she engineered, and which cost the company extra money. The officials of the company did not know this until the day of her discharge. On such day each employee was asked to get her card from the time clock so the time could be punched on it for a speech the employer was going to make so the employees would lose no time and would be paid for their time. She refused to get her card and then went to the meeting and while the employer was talking used the phone in the same portion of the premises where the speech was being made and generally conducted herself in an arbitrary manner. She also at the time of the discharge threatened to kill the supervisor. For these reasons and because her work had become bad, she was discharged.

The above letter was written after Respondent had been informed by the Regional Director of the filing of the Union's unfair labor practice charges and of objections to the election. It is well settled that the admissions of an attorney in the management of litigation are admissible against the client. 4 Wigmore, Evidence, secs. 1063, 1078 (3d ed. 1940), *N.L.R.B. v. Pacific Intermountain Express Company, et al.*, 228 F. 2d 170, 175 (CA 8), cert. denied 351 U.S. 952. Moreover, this letter was written after Respondent had received notice of the filing of the unfair labor practice charges. *The Lummus Company*, 101 NLRB 1628, 1629, enf. as modified 210 F. 2d 377, 379 (CA. 5). Accordingly, we overrule the Trial Examiner and receive the letter into evidence as General Counsel's Exhibit No. 3.

was committed. The rulings are hereby affirmed. The Board has considered the entire record in the case, including the Intermediate Report, and the exceptions and brief, and finds merit in the General Counsel's exceptions. Accordingly, the Board adopts the findings of the Trial Examiner only to the extent consistent with the following:

The Trial Examiner disposed of the case on a theory not seriously argued by the General Counsel and ignored the real theory urged by the General Counsel. The Trial Examiner treated the allegation that Respondent had discriminatorily discharged Ruby Lee Middlebrook as if it involved nothing more than the typical case of a discharge for engaging in union activities. Since he found that Respondent was unaware of Middlebrook's organizing activities in behalf of the Union at the time of the discharge, the Trial Examiner concluded that the discharge did not constitute a violation of Section 8(a)(3) and (1) of the Act. However, the principal theory urged by the General Counsel, as is evidenced by his brief to the Trial Examiner reiterated in his brief to the Board, was that Middlebrook had been discharged for leading a walkout of employees to protest working conditions, that the walkout was a protected concerted activity, and that, therefore, the discharge for engaging in such walkout was a violation of Section 8(a)(3) and (1) of the Act.

The facts with respect to the discharge of Middlebrook are as follows:

Those of Respondent's employees who are involved in this proceeding are engaged in processing poultry. They report for work at 7 a.m., but do not punch in and begin to receive pay until the poultry is on the line ready for processing. The commencement of operations depends upon when trucks bringing poultry to the plant arrive. There are times when, because of this factor, the start of processing is delayed for as much as an hour or two. Employees receive no compensation for this waiting time.

One day in the first part of December 1960, Middlebrook arrived for work at 6:30 a.m. She waited almost 2 hours for processing to begin to no avail. At 8:30 a.m. Respondent's vice president told Middlebrook and other employees that the poultry was late and would not arrive until 9:30 a.m., which meant that employees would have to wait for approximately 2½ hours without pay before they could begin working. The employees thereupon decided that they would go to a cafe in town because they were tired of their payless waiting. They also agreed to Middlebrook's suggestion that they remain at the cafe until 10:30 a.m. and that if any one of them was discharged they would all quit. Middlebrook then drove two carloads of employees to the cafe. When the poultry was received at the plant at 9:30 a.m., Respondent discovered that the poultry processors were absent and sent another employee to the cafe to recall them. Respondent suffered some loss as the result of delay in the commencement of processing.

On December 14, 1960, Respondent called the employees together to listen to an antiunion speech. Each employee was told to pick up his or her own timecard before coming to the meeting. Middlebrook did not pick up her card. In the past when employees had been assembled for a meeting on company time, one employee usually had picked up the timecards for four or five employees.

Respondent discharged Middlebrook after the meeting of December 14. It assigns three reasons for the discharge: (1) failure to pick up the timecard; (2) deterioration in her work which had begun in September 1960; and (3) leadership in the walkout 2 weeks previously which had resulted in some spoilage because of delay in processing.

As to the first reason, Middlebrook's supervisor testified that this was the first and only occasion that employees had been instructed to pick up their own timecards before attending a company meeting. Under the circumstances, this would hardly seem such a serious dereliction as to justify a discharge.

As to the second reason, Middlebrook was engaged together with three other girls in cleaning chicken gizzards. Government inspectors had complained that the gizzards were still dirty after processing. However, all four girls were responsible for the faulty cleaning; it could not be attributed only to Middlebrook. None of the other girls, equally responsible with Middlebrook for the defective work, has been discharged.

As to the third reason, we find that it was unlawful. Middlebrook's leadership of employees in leaving the plant when informed that the poultry would be late in arriving was in protest of the requirement for unpaid waiting time. It was thus a walkout or strike in protest against existing working conditions. As such it was concerted activity protected by the Act and Respondent could not lawfully discharge her for engaging therein.² General Counsel's Exhibit No. 3, the letter from Respondent's counsel to the Board, and testimony of Respondent at the hearing indicate that Respondent was aware of the circumstances of the walkout as well as Middlebrook's role therein and that this was one of the reasons for her discharge.³

Accordingly, we find that by discharging Middlebrook, Respondent violated Section 8(a)(3) and (1) of the Act.

Case No. 16-RC-2783

On December 16, 1960, a representation election was held among the employees of the Respondent in which Dallas General Drivers,

² *Solo Cup Company*, 114 NLRB 121, enfd. 237 F. 2d 521 (C.A. 8); *Gullett Gin Company, Inc. v. N.L.R.B.*, 179 F. 2d 499 (C.A. 5), enfg. as modified 83 NLRB 1, reversed and remanded on other grounds, 340 U.S. 361.

³ The fact that there may have been other reasons for discharging her which were lawful does not make the discharge any the less unlawful. *N.L.R.B. v. Jamestown Sterling Corp.*, 211 F. 2d 725 (C.A. 2).

Warehousemen and Helpers Local Union No. 745 and Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local No. 540, were Joint-Petitioners. The Joint-Petitioners were defeated in the election. Thereafter, the Joint-Petitioners filed timely objections to conduct affecting the results of the election, alleging in part that Ruby Middlebrook, a known union leader, had been discriminatorily discharged just 2 days before the election. As we have found above that Respondent did discriminate in the discharge of Ruby Middlebrook in violation of Section 8(a) (3) and (1) of the Act, we also find that the election in Case No. 16-RC-2783 should be set aside and that a new election should be conducted by the Regional Director for the Sixteenth Region at such time as he deems the circumstances permit the free choice of a bargaining representative.

The Effect of the Unfair Labor Practices on Commerce

The activities of the Respondent set forth 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.

The Remedy

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel stated at the hearing that he was not seeking reinstatement and backpay for Ruby Middlebrook as she had forfeited these rights through her subsequent activity. Accordingly, we shall not order her reinstated to her previous position and we shall not direct that backpay be awarded her.

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

CONCLUSIONS OF LAW

1. Ablon Poultry & Egg Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local No. 540, and Dallas General Drivers, Warehousemen and Helpers Local Union No. 745 are labor organizations within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Ruby Lee Middlebrook, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (3) and (1) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Re-

spondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

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, Ablon Poultry & Egg Company, Dallas, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local No. 540, or any other labor organization of its employees, by discharging employees or otherwise 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 its employees in the exercise of the right to self-organization, to form, join, or assist any 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 of such activities.

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

(a) Post at its office and plant in Dallas, Texas, copies of the notice attached hereto marked "Appendix."⁴ Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

IT IS HEREBY FURTHER ORDERED that the election held on December 16, 1960, among Respondent's production and maintenance employees be, and it hereby is, set aside and that Case No. 16-RC-2783 be, and it hereby is, remanded to the Regional Director for the Sixteenth Region

⁴In 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."

for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of a bargaining representative.

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 Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local No. 540, or in any other labor organization of our employees, by discharging our employees or otherwise discriminating in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, 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.

ABLON POULTRY & EGG COMPANY,
Employer.

Dated----- By-----
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

In Case No. 16-CA-1444, upon charges filed on December 23, 1960,¹ by Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local No. 540, herein called the Union, the General Counsel for the National Labor Relations Board, herein called the General Counsel, caused a complaint to issue on February 3, 1961, alleging that Ablon Poultry & Egg Company, herein called the Respondent, had engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed its answer denying it had violated the Act as alleged in the complaint.

In Case No. 16-RC-2783, pursuant to a Decision and Direction of Election issued by the Board, an election was conducted on December 16 among the employees of Respondent in a unit found by the Board to be appropriate. Thereafter, on or about December 21, the Joint-Petitioners, of which the Union was one, filed objections to conduct affecting the result of the election. On February 8, 1961, the Regional Director, after investigation, issued his report on objections to election. As to all objections, except one, he recommended that the objections be overruled. As to the one, which alleged that "a known Union leader" (Ruby Lee Middlebrook) had

¹All dates herein are in the year 1960 unless otherwise indicated.

been discharged just prior to the election, the Regional Director recommended "that a hearing on objections be held with respect to this allegation and that it be consolidated with the unfair labor practice charge (Case No. 16-CA-1444) for purposes of the hearing." On February 23, 1961, the Board issued its order directing hearing in which it adopted the Regional Director's recommendations.² Thereafter, on February 24, 1961, the Regional Director issued order consolidating cases for hearing.

Pursuant to notice, the hearing was held before the duly designated Trial Examiner at Dallas, Texas, on March 16, 1961. Each of the parties was represented by counsel. The parties were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. Each of the parties waived oral argument; each filed briefs.

The issue in both cases is whether Respondent discharged Ruby Lee Middlebrook in violation of Section 8(a) (3) and (1) of the Act.

Upon consideration of the entire record, the briefs, and upon observation of the witnesses, I make the following findings and conclusions:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Texas.

At all times material herein Respondent has maintained its principal office and place of business at 2411 Ferris Street in the city of Dallas, State of Texas, herein called the plant, and is, and has been at all times material herein, engaged at said plant and location in the processing, sale, and distribution of poultry products. The Respondent's plant located at 2411 Ferris Street, Dallas, Texas, is the only plant involved in this proceeding.

During the past year Respondent in the course and conduct of its business operations, caused to be processed, sold, and distributed at said plant poultry products valued in excess of \$500,000, of which products valued in excess of \$500,000 were furnished to, among others, Wyatt Food Stores, a division of Kroger Company, which enterprise annually purchases goods valued in excess of \$50,000 directly from out of the State of Texas.

I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act. I so find.

III. THE DISCHARGE OF RUBY LEE MIDDLEBROOK

Ruby Lee Middlebrook, herein called Middlebrook, was employed by Respondent in 1951 and worked until the date of her discharge (December 14, 1960); except that during that period she quit and was not employed for about a year in 1953-54. Her job was processing giblets.

Middlebrook signed a union card in November 1960. Thereafter, she successfully solicited 61 of Respondent's employees to sign such cards.

Middlebrook's testimony is lacking in probative value concerning the vital issue as to whether Respondent, at or before the time of her discharge, had knowledge of her union activities. The evidence adduced by the General Counsel to prove this indispensable element of his case was not the best evidence and questionable. This is all of it: George Schatzki testified that following the election on December 16, 1960, 2 days after the discharge of Middlebrook, he was in one of the Respondent's offices with some seven or eight people and overheard part of a conversation between Samuel J. Ablon, Respondent's vice president, and Richard Twedell, a business representative of the Union. According to the witness: "Mr. Twedell made a statement something to the effect 'Well, you knew all along that Ruby (Middlebrook) was organizing the union over here, didn't you?' and Mr. Ablon said, 'Sure. Sure, I knew it.'" The General Counsel did not call Twedell, the Union's business representative, as a witness; no reason is found in the record for failing to do so.

² No objections to the Regional Director's report on objections to election were filed by either of Joint-Petitioners.

Samuel Ablon admitted having a conversation at the time and place with Twedell. He denied that he (Ablon) made the statement attributed to him by the witness, Schatzki. Further, he testified that he did not know that Middlebrook was an organizer for the Union at the time he fired her. From this scanty and conflicting evidence I find that the General Counsel has not proven, by a preponderance of the testimony, that Respondent had knowledge of Middlebrook's union activities. Consequently, because of failure to prove the indispensable element of knowledge it will be recommended that the complaint be dismissed.³

IV. THE OBJECTIONS IN CASE NO. 16-RC-2783

The Regional Director in his report on objections to the election found only one objection merited hearing.⁴ The Board ordered the hearing and that it be consolidated with Case No. 16-CA-1444.

Concerning the objection, here at issue, the Regional Director concluded and recommended:

In view of the coercive effect of the discharge of a *known* Union leader (Middlebrook) just prior to the election . . . it is recommended that a hearing on objections be held with respect to this allegation. . . . [Emphasis supplied.]

Inasmuch as it was not proven that Middlebrook was "known" to Respondent as a "Union leader" at the time of her discharge, it will be recommended, that this objection be overruled.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Middlebrook was not discharged by Respondent in violation of Section 8(a)(3) and (1) of the Act.
4. Respondent did not interfere with the election in Case No. 16-RC-2783 by its discharge of Middlebrook 2 days before the election.

[Recommendations omitted from publication.]

³ If the element of knowledge had been proven I would find that Middlebrook was discharged because of her attitude toward her job and superiors and her propensities; and not in violation of Section 8(a)(3) and (1) of the Act. It is to be noted that at the opening of the hearing the General Counsel stated that he was not seeking reinstatement and backpay for Middlebrook "since it's our position she has forfeited these particular rights through subsequent activity on her part."

⁴ All other objections were overruled. No exceptions were filed.

National Furniture Manufacturing Company, Inc. and Local Union No. 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case No. 25-CA-1336. November 29, 1961

DECISION AND ORDER

On June 9, 1961, Trial Examiner Ramey Donovan 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 and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.