

establishment from a point located in the State of Texas or from a point located in the State of Wisconsin.

7. A purchase of a new \$6,731.09 Cadillac passenger automobile from Galles Motor Company, Albuquerque, New Mexico, which automobile was shipped to Galles' Albuquerque establishment from the Detroit, Michigan, plant of the Cadillac Division of General Motors Corporation. Galles' annual out-of-State purchases of new automobiles amount to about \$225,000.

Upon the basis of the foregoing facts, it is again found, in line with established Board authority, that Respondent is engaged in, and during all times material was engaged in, business affecting commerce within the standards fixed by the Board for the assertion of jurisdiction.

Acme Fast Freight, Inc. and John Tomarelli

Lodge 1618, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO and John Tomarelli. Cases Nos. 2-CA-7128 and 2-CB-2804. December 8, 1961

DECISION AND ORDER

On June 29, 1960, Trial Examiner George J. Bott issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel and Respondents filed exceptions to the Intermediate Report and supporting briefs.¹

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 briefs, and the entire record in this proceeding,² and finding merit in the Respondents' exceptions, hereby adopts the findings and conclusions of the Trial Examiner only to the extent consistent with our decision herein.

For the reasons set forth in the Intermediate Report, we agree with the Trial Examiner that Tomarelli did not make a full and complete tender to the Respondent Union of all dues and fees which he was lawfully required to tender until after the Respondent had effectively requested his discharge. We also find in this record insufficient evi-

¹ Pursuant to leave of the Board, briefs *amici curiae* were filed on behalf of Aluminum Workers International Union, AFL-CIO, American Federation of Technical Engineers, AFL-CIO, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Tobacco Workers International Union, AFL-CIO.

² As the record and briefs adequately present the issues and positions of the parties and intervenors *amici*, the several requests for oral argument, including that of American Federation of Labor and Congress of Industrial Organizations, are hereby denied

dence that Respondents effected Tomarelli's discharge for any reason other than the delinquencies which existed at the time the discharge request was made. In these circumstances, and for the reasons set forth in *General Motors Corporation, Packard Electric Division*,³ we find, contrary to the allegations of the complaint, that the Respondent Company did not violate Section 8(a)(3) and (1) of the Act, and the Respondent Union did not violate Section 8(b)(2) and (1)(A).⁴ Accordingly, we shall dismiss the complaint.

[The Board dismissed the complaint.]

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

³ 134 NLRB 1107

⁴ Member Brown, as indicated in footnote 3 of the *General Motors* case, *supra*, in joining the majority in this case, does not view this decision as determining whether the validity of the discharge action is contingent upon a specific request for discharge before a belated tender is made.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon charges of unfair labor practices duly filed against the Respondents, Acme Fast Freight, Inc., herein called the Company, and Lodge 1618, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board issued a consolidated complaint and notice of hearing dated March 16, 1960. Answers denying the commission of unfair labor practices were duly filed by Respondents and a hearing was held before the duly designated Trial Examiner at New York, New York, on April 4, 1960. The General Counsel, the Company, and the Union were represented by counsel, participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, to present oral argument, and to file briefs. The General Counsel and the Respondents argued orally at the close of the hearing and the Respondents submitted briefs which have been considered. The Charging Party, John Tomarelli, did not enter an appearance but testified as a witness for the General Counsel.

Upon the entire record¹ in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT COMPANY

Acme Fast Freight, Inc., is, and has been at all times material herein, a Delaware corporation engaged in the business of receiving and forwarding freight for various persons. It maintains its principal office at 2 Lafayette Street, New York, New York, and operates a nationwide system of over 120 freight forwarding terminals and depots in various States of the United States, including a freight depot in Bridgeport, Connecticut, the facility involved herein. During the year prior to the issuance of the complaint the Company, in the course and conduct of its business operations, received and forwarded freight between various States of the United States and in foreign commerce, and received an income in excess of \$75,000,000 for such services. Respondents admit, and I find, that Respondent Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Lodge 1618, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

¹ Respondents' motions to correct the transcript are hereby granted

III. THE UNFAIR LABOR PRACTICES

The Issue

The issue is whether or not John Tomarelli, the Charging Party, was terminated by the Respondent Company at the instance of the Respondent Union in violation of Section 8(a)(1) and (3) and 8(b)(1)(A) and (2) of the Act.

The Facts

There is no serious dispute about the basic facts in the case. The Company and Union were, at all times material herein, parties to a collective-bargaining agreement containing a valid union-shop provision. The agreement, in pertinent part, provided as follows:

A. Rule 46—ORGANIZATION MEMBERSHIP

Membership in said Brotherhood shall be required as a condition of employment, and all employees eligible to membership in said Brotherhood, and whose positions come under the scope rule of the agreement between the parties, shall become members within sixty (60) days from date of this agreement, and remain members in good standing of said Brotherhood. Employees who hereafter enter the service of said company shall become members of said Brotherhood within sixty (60) days from the date they enter the service, and remain members of said Brotherhood, in good standing.

Employees enumerated above who fail to tender their application and fee within the time limits specified above, or who fail to tender their dues, will be released from the service of the said company.

Nothing in this agreement shall require an employee to become a member of the Brotherhood if such membership is not available to such employee upon the same terms and conditions as are generally applicable to any other member; or to remain a member if membership be terminated for any other reason other than failure of the employee to tender uniform dues required as a condition of retaining membership in the Brotherhood.

The Brotherhood will notify management of employees who fail to tender their application and fee within the time limits specified above, or employees who fail to tender uniform dues, and such employees will be released and have their service and seniority terminated after proper hearing, as soon as qualified replacement can be secured, but in no case later than thirty (30) calendar days from the date of said notice.

B. Rule 34—ADVICE OF CAUSE

An employee charged with an offense, shall be furnished with a letter with a letter stating precise charge within ten (10) days of date of alleged offense.

C. Rule 35—INVESTIGATION AND HEARING

An employee who has been in the service more than sixty (60) days or whose application has been approved shall not be disciplined or dismissed without investigation and hearing. He may, however, be held out of service pending such investigation and hearing. The investigation shall be held within seven (7) days of the date when charged with the offense or held out of service and a decision will be rendered within seven (7) days. The time limits provided in this rule may be extended by mutual agreement. Transcript of evidence submitted at investigation or hearing will be taken in writing if requested by employee or his representative and copy furnished employee or his representative.

John Tomarelli had been employed by the Company at its Bridgeport, Connecticut, terminal, for 5 or 6 years prior to his discharge on October 30, 1959, and subject to the terms of the above agreement. He became a member of the Union in January 1955, and remained a member to September 30, 1959, when he was automatically suspended from membership in the Union because of his failure to pay his monthly dues for the months of August and September.

The May 1959 convention of the parent union amended its constitution and laws for the government of subordinate bodies in a number of respects. One amendment, relating to the payment of dues and suspension from membership for nonpayment thereof, read as follows:

Dues are due and payable on the first day of each calendar month, which means that a member owes two months dues on the first day of the second month. It is the responsibility of every member to know when dues are payable and pay them to an authorized representative of his Lodge within the time limits specified in this Article. No demand for payment of such dues or notice of non-payment thereof or of delinquency is necessary or required. A member who fails to pay his dues within the time limits specified in this Article is automatically suspended at 12 o'clock midnight of the last day of the second month for which he owes dues and no notice of suspension is required. The Secretary shall report such suspension on the next quarterly per capita tax report to the Grand Lodge.

This amendment was published in subsequent issues of the Union's magazine which Tomarelli admitted receiving. On October 2, 1959, M. D. Connolly, financial secretary-treasurer of the Union, wrote the Company and informed it that Tomarelli had, "by his failure to pay Union Dues for the months of August and September 1959, allowed himself to become delinquent and is suspended from membership automatically as of 12 o'clock midnight of September 30, 1959." On October 13, the Company, acting pursuant to the provisions of the collective-bargaining contract set forth above, notified Tomarelli by letter that it had received the notification from the Union about Tomarelli's delinquency and suspension and that on October 21 a hearing would be set up "for the elimination of your services from Acme Fast Freight, Inc." In the meantime, however, on October 8, Tomarelli had given Mrs. Moriarty, the Company's assistant cashier and also a member of the Union, \$23 in cash and asked her to send her personal check in that amount to Connolly representing Tomarelli's dues for August and September and a reinstatement fee. Mrs. Moriarty sent Connolly her check for \$23 with a note that, "Check No. 087 covers dues for August and September for Tomarelli plus \$15 reinstatement." On October 10, Connolly wrote Mrs. Moriarty, acknowledged receipt of her check for dues and reinstatement fee for Tomarelli, and advised her further that the check would be held in abeyance "awaiting decision of our General Chairman, Mr. J. P. Robinson, whom I am today contacting." Connolly concluded that he would advise Moriarty further "upon receipt of information."

On the same day, Connolly wrote Robinson, his superior in the Union, for advice about Tomarelli's reinstatement. In this letter Connolly informed Robinson that he had received \$23 from Tomarelli in payment of August and September dues and reinstatement fee but that Tomarelli had failed to file an application for reinstatement. Connolly told Robinson, however, that he had not asked Tomarelli for a reinstatement application, "due to conflicting interpretations of our position." Connolly gave his personal opinion in the letter to Robinson that it seemed to him that it would be in order to accept Tomarelli's application for reinstatement.

On October 21, a hearing was held in the Company's Bridgeport, Connecticut, office on the question of Tomarelli's suspension from the Union and discharge from the Company. At that time no reply to Connolly's letter asking advice had been received from Robinson. Present at the October 21 hearing were Tomarelli, Louis Ruggiero, managing agent of the Company, Connolly, and two other union officials. Mrs. Moriarty, assistant cashier, who had sent Tomarelli's dues and reinstatement fee to the Union, was also present in the room in which the hearing was held but only in her capacity as an employee of the Company and not as a participant in the hearing. At the hearing Tomarelli admitted that he had not paid his August and September dues and was delinquent. On the other hand, Ruggiero admitted that at the hearing Tomarelli stated that he had offered to pay his dues by way of a check drawn on the account of Mrs. Moriarty and that the Union had refused to accept this check. Ruggiero also stated that Connolly said at the hearing that the Union had refused to accept the check drawn on Mrs. Moriarty's account. At the close of the hearing Mrs. Moriarty's check was returned to her with instructions from one of the union representatives to return it to Tomarelli. Nothing was said at the hearing by any participant about dues for Tomarelli for any months other than August and September nor was any suggestion made as to how Tomarelli could get in good standing in the Union such as for example, by filing an application or tendering additional dues. Connolly admitted that no effort was made to tell Tomarelli that he owed anything in addition to the dues and reinstatement fee he had sent the Union on October 8. He testified that any question of extra dues was not important at the time because he was waiting for a ruling from his superiors.

Tomarelli was discharged at the end of the hearing, effective as of October 30, and has not been reinstated by the Company. After the hearing Connolly received

a reply to his letter to Robinson in which Robinson informed him that to effect the reinstatement of Tomarelli to membership it would be necessary for Tomarelli to pay a reinstatement fee of \$15 dues for August and September and for the month in which reinstatement was effected, namely, October. Robinson also told Connolly that a new application would be necessary. This information was never communicated to Tomarelli.

Concluding Findings

The General Counsel, relying on *Aluminum Workers International Union, Local 135*, 112 NLRB 619, enfd. 230 F. 2d 515 (C.A. 7), contends that since Tomarelli has tendered dues for August and September and a reinstatement fee prior to his actual discharge, the Union violated Section 8(b)(1)(A) and (2) of the Act by causing his discharge. Since the Company had actual knowledge that Tomarelli had tendered all moneys owed the Union, he argues, the Company violated Section 8(a)(1) and (3) of the Act by effecting the termination. As additional support for the allegations of discrimination under the Act the General Counsel also contends that the Union's notification to the Company on October 2, 1959, of Tomarelli's delinquency and suspension was not an "operative demand" for his discharge within the meaning of the court's opinion in *Aluminum Workers Union, supra*, in that a hearing under the collective-bargaining contract was a necessary condition to a discharge. Disposing of this secondary position first, I conclude that since Tomarelli had actually been suspended from the Union prior to the Union's notification to the Company, unlike the situation in the *Aluminum Workers* case, the Union's demand was "operative" within the meaning of that decision.

The General Counsel's primary contention, however, finds full support, in my view, in the principle enunciated by the Board in the *Aluminum Workers* case. There the Board said:

. . . we hold that a full and unqualified tender made at any time prior to actual discharge, and without regard as to when the request for discharge may have been made, is a proper tender and a subsequent discharge based upon the request is unlawful.²

The Union's position, on the other hand, with which the Company generally agrees, is that Tomarelli did not make a full and unqualified tender of dues prior to his discharge. In more detail the Union contends as follows: Having failed to pay dues for August and September, Tomarelli was automatically suspended from the Union as of September 30. Since he occupied the position of a suspended member on that date, he, in order to become reinstated under the governing law of the Union, was required to apply for reinstatement on an application form supplied by the Union and pay all necessary fees. In the case of a former member applying for reinstatement the monetary requirement is a reinstatement fee, back dues owing when the suspension occurred, and current dues for the month in which reinstatement is requested. On October 8 Tomarelli tendered a reinstatement fee and August and September dues, but did not make an application for reinstatement or tender October dues. In fact, Tomarelli made no such tender at any time before his actual discharge. I find, in accord with the Union's contention, that Tomarelli was suspended as of September 30 and that to acquire membership in good standing in the Union, under the governing laws of the Union, he would normally be required to apply for reinstatement, and pay the reinstatement fee and his back dues. In view of the fact that the record shows that Tomarelli, and other employees of the Company, were frequently late in payment of dues and that dues had historically been accepted by Financial Secretary Connolly up to the 10th day of the third month where employees were 2 full months in arrears, I have grave doubts that even under union law Tomarelli had to tender October dues when he sent his reinstatement fee and August and September dues. Even Connolly, it must be noted, in his letter to Robinson, mentioned nothing about

² Those courts which have had occasion to consider this doctrine have not dealt kindly with it. *The International Association of Machinists, AFL-CIO, et al v NLRB*, 247 F. 2d 414 (C.A. 2), where the court said the *Aluminum Workers* doctrine was "an incorrect statement of the law" *NLRB v. Technicolor Motion Picture Corporation, et al.*, 248 F. 2d 348 (C.A. 9), in which the court stated that the Board's original position, contrary to the *Aluminum Workers* principle, "is correct" The Board has continued to adhere to its view in the *Aluminum Workers* case. See *International Woodworkers of America, AFL-CIO (T. Smith & Son, Inc., et al)*, 117 NLRB 405, and 119 NLRB 1681; *Technicolor Motion Picture Corporation*, 122 NLRB 73; *Producers Transport, Inc.*, 125 NLRB 1056.

October dues although his letter was written on October 10, but on the other hand, suggested to his superior that it would be in order to accept Tomarelli's application for reinstatement on the basis of what he had tendered to date. Furthermore, Connolly, in acknowledging receipt of the Moriarty check for Tomarelli's dues and reinstatement fee, referred only to August and September dues and not October. I will assume, however, for the purpose of this report, that Tomarelli was also required to tender October dues to be eligible for reinstatement. Nevertheless, even on the basis of this assumption there is an essential weakness in the Union's case.

Tomarelli's status with respect to membership in the Union is immaterial. Even where all the requirements of a valid union-shop contract are met, as in the instant case, the Act provides that the only ground upon which an employee can be legally discharged is for nonpayment of dues and initiation fees.³ Tomarelli, prior to the hearing looking to his discharge, tendered the only dues and fees⁴ that anyone in authority in the Union or Company told him were due. Giving full scope to the doctrine of the *Aluminum Workers* case, it would, in my view, be inequitable to permit the Union to rely on an interpretation of its constitution and laws at this late date which it was unable to make for itself at the time it requested Tomarelli's discharge. As set forth above, Tomarelli, prior to his discharge, and even prior to the hearing required by the collective agreement, which was supposed to determine the validity of the asserted grounds for discharge, tendered August and September dues and a reinstatement fee. He testified, and I credit him, that he would have been willing to pay an additional amount to save his job if anyone had asked him for it. No union representative at any time told him what he might do in the way of paying additional dues or fees or making formal application in order to become a member in good standing under the contract or the laws of the Union. On the contrary, Connolly found it necessary to seek official advice about the problem from the main office of the parent body before accepting the tender but the hearing took place before advice was received, even in the face of Connolly's own suggestion to Robinson, his superior, that Tomarelli's "tender" was sufficient and might be accepted if the parent body agreed. It seems to the Trial Examiner that it would be utterly unfair to hold an untutored and ordinary union member to a higher standard of legal interpretation of the Union's governing law than a union officer of many years experience. In addition, as set forth in the statement of facts above, the only issue at Tomarelli's hearing was his nonpayment of August and September dues and to allow the Respondents to rest their defense on matters which the employee had no opportunity to meet would make a mockery out of the hearing which is guaranteed the employee in the contract as a measure of industrial due process. I conclude, therefore, that Tomarelli did all that was required of him financially at the time of his tender and that the Union is estopped to rely at this late date on what was probably an accurate interpretation of its governing law.⁵ The Union's action, therefore, in causing Tomarelli's discharge for some reason other than his failure to pay his periodic dues and reinstatement fee was a violation of Section 8(b)(1)(A) and (2) of the Act.

The Company was represented at Tomarelli's hearing by Ruggiero, a responsible official of Respondent Company. It was clear from what was said by Tomarelli and admitted by the Union at the hearing that Tomarelli had tendered his August and September dues and a reinstatement fee and that such was the only issue in the hearing. Since the Company knew that Tomarelli had tendered all that the Union had demanded it had reasonable grounds for believing that Tomarelli's discharge had been sought for some reason other than his failure to pay his dues and reinstatement fee. The Company, therefore, violated Section 8(a)(3) and (1) of the Act by effecting Tomarelli's discharge in those circumstances.⁶

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

³ *The Radio Officers' Union etc (A. H. Bull Steamship Co) v NLRB*, 347 US 17, 40-41; *Union Starch & Refining Co. v NLRB*, 186 F 2d 1008 (CA 7)

⁴ I assume, without deciding, that a reinstatement fee could have been required of Tomarelli as a suspended member

⁵ *Hall-Scott, Incorporated, et al*, 124 NLRB 1305; *International Woodworkers of America, supra*

⁶ *American Screw Company*, 122 NLRB 485, 489.

V. THE REMEDY

Having found that the Respondents engaged in unfair labor practices, the Trial Examiner will recommend that they cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

It will be recommended that the Respondent Company offer John Tomarelli immediate and full reinstatement of his former or substantially equivalent position, without prejudice to seniority or other rights and privileges; and that the Respondent Union notify the Respondent Company in writing, and furnish a copy to Tomarelli, that it has withdrawn its objections to the employment of Tomarelli by the Respondent Company and requests the Respondent Company to reinstate him.

Since it has been found that the Respondent Union and Respondent Company are both responsible for the discrimination suffered by Tomarelli, it will be recommended that they jointly and severally make him whole for the loss of pay he may have suffered by reason of the discrimination against him, by payment to Tomarelli of a sum of money equal to that which he normally would have earned as wages from October 30, 1959, to the date of the Respondent Company's offer of reinstatement, less his net earnings during said period. Provided, however, that the Respondent Union's liability shall be tolled 5 days after it serves written notice on the Respondent Company of its withdrawal of objections to Tomarelli's employment and its request for his reinstatement. The backpay provided for herein shall be computed in accordance with the formula stated in *F. W. Woolworth Company*, 90 NLRB 289. The Company will also be directed to make available to the Board, upon request, payroll and other appropriate records in its possession to facilitate determination of the amount due.

On the basis of the foregoing findings, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the hire and tenure of employment of John Tomarelli, thereby encouraging membership in Respondent Union, Acme Fast Freight, Inc., 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 causing the Company to discriminate against Tomarelli in violation of Section 8(a)(3) of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(2) and (1)(A) 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.

[Recommendations omitted from publication.]

Consolidated Edison Company of New York, Inc. and Transport Workers Union of America, AFL-CIO, Local 100, Petitioner and Brotherhood of Consolidated Edison Employees, Utility Workers Union of America, CIO, Intervenor

Consolidated Edison System Companies and Brotherhood of Consolidated Edison Employees, Utility Workers Union of America, CIO. Cases Nos. 2-RC-10121 and 2-R-5938. December 8, 1961

**SUPPLEMENTAL DECISION AND ORDER
DENYING MOTIONS**

On September 25, 1961, Consolidated Edison Company of New York, herein called the Employer, filed with the Board a motion

134 NLRB No. 106.