

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(B) of the Act, I shall recommend that it cease such conduct and like or related acts, and take certain affirmative action to effectuate the purposes of the Act. While the electrical work stopped by Respondent's conduct was completed prior to the hearing in this proceeding, and Respondents and its agents did not interfere with the resumed work, there is no guarantee disclosed by the evidence of record that Respondent will not engage in similar conduct in the future. Respondent refrained from interfering with the work resumed by Hoertz on or about January 30, 1962, because an unfair labor practice charge had been filed against it, and the General Counsel of the Board had the charge under investigation. Respondent did not assure Ohio that it would not repeat its conduct of January 9, 10, and 11, 1962. In fact, Seeholzer made clear to the president and vice president of Ohio that Respondent would not permit it to contract for construction work with a nonunion electrical contractor. Its noninterference with the resumed work and its indication to Ohio that it would not interfere, were clearly an expedient effort to avoid liability for its prior illegal conduct. For these reasons, I recommend to the Board that it issue an order against Respondent to protect Ohio from future secondary illegal conduct of Respondent.

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

CONCLUSIONS OF LAW

1. Ohio Pipe and Supply Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and is a person engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4)(ii)(B) of the Act.
2. Respondent Electrical Workers Union Local 38, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The said Respondent Electrical Workers Union Local 38 violated Section 8(b)(4)(ii)(B) of the Act by threatening, coercing, and restraining Ohio Pipe and Supply Company to force or require it to cease doing business with Raymond J. Hoertz, doing business as Hoertz Electric Maintenance Co.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

Allen-Stevens Corporation and Architectural & Engineering Guild, Local 66, American Federation of Technical Engineers, AFL-CIO. *Case No. 2-CA-8464. August 16, 1962*

DECISION AND ORDER

On June 12, 1962, Trial Examiner Horace A. Ruckel 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, as set forth in the attached Intermediate Report. 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 Leedom and Brown].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the General Counsel's exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

[The Board dismissed the complaint.]

¹ The General Counsel contends that the Trial Examiner's credibility findings are erroneous. It is the policy of the Board, however, not to overrule a Trial Examiner's credibility findings except where a clear preponderance of all the relevant evidence convinces us that these findings are incorrect. No such conclusion is warranted in this case. See *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enf'd. 188 F. 2d 362 (C.A. 3).

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge filed on February 13, 1962, by Architectural & Engineering Guild, Local 66, American Federation of Technical Engineers, AFL-CIO, herein called the Union, the Regional Director for the Second Region of the National Labor Relations Board, herein called the Board, on March 16, 1962, issued a complaint against Allen-Stevens Corporation, herein called Respondent. The complaint alleges, in substance, that Respondent, by its agents, in February 1962, committed unfair labor practices by (1) interrogating employees concerning their support of the Union and threatening that if they designated the Union as their bargaining representative Respondent would reduce payments to them under an existing profit-sharing plan; and (2) on or about February 9, 1962, discharging Izchak Cycowicz because of his union activity, thus violating Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151, *et seq.*), herein called the Act. Respondent's answer denies the commission of any unfair labor practices.

Pursuant to due notice, Trial Examiner Horace A. Ruckel conducted a hearing at New York, New York, on May 2 and 3, 1962, at which all parties were represented by counsel. At the conclusion of the hearing the parties argued the issues orally. Respondent subsequently filed a brief. Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent is a New York corporation having its office and place of business in New York City, where it is engaged in the manufacture, sale, and distribution of die-castings and related products. It employs about 200 employees. During the year prior to the issuance of the complaint Respondent manufactured, sold, and distributed at its New York plant products valued in excess of \$500,000, of which products valued in excess of \$50,000 were shipped from its plant in interstate commerce directly to States of the United States other than the State of New York. The complaint alleges and Respondent's answer admits that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges and Respondent's answer admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The alleged discriminatory discharge of Cycowicz*

1. Background

The Union began organizing Respondent's technical employees, about 11 in number, in December 1961. At a meeting on December 26, Jerry Raimist, business manager for the Union, gave a number of application cards to Izchak Cycowicz who

distributed them among his fellow employees and obtained some signatures. On February 2 the Union filed a petition for certification in the Board's New York office. Two days previously, January 31, Raimst wrote Respondent a letter advising it that the Union had organized its engineering employees, and requesting recognition and a conference to discuss a contract. Respondent received this letter on February 1.

2. The discharge

Cycowicz was employed by Respondent in August 1957, as a project engineer, a position which he held until his discharge on February 9, 1962, under circumstances hereinafter related. His immediate supervisor was Murray Sanders, Respondent's treasurer and chief engineer, with whom he did most of the work on conduit fittings, one of Respondent's principal products. Murray Sanders own superior is Albert Sanders, his brother, who is Respondent's president. Respondent employed four project engineers, two of whom combined engineering work with sales promotion. Cycowicz and another employee, De Angelis, hired in January 1961, confined themselves principally to technical engineering projects.

Both the Sanders brothers testified freely that Cycowicz is technically very competent in the engineering sense of the term. Their testimony, however, is that beginning about 2 years before Cycowicz' discharge, said to be because of his "unproductivity," Respondent became increasingly dissatisfied with his work performance. They state that Cycowicz, though technically able, spent too much time on most of his projects. According to Albert Sanders, Cycowicz, though a "painstakingly intelligent man," could not or would not turn out the amount of work demanded of him. He characterized him as follows:

I think also that he is unimaginative. That is not to say that he is not good at the detailed development, if given enough time, of specific projects which have already been laid out for him, and most of all—I resented or was amazed, I should say, by his attitude. He made me slightly crazy, I would say, whenever I discussed things with him, because he had a way of arguing with you which you could never really beat. He quibbled, he brought up all kinds of false analogies—I had the feeling—that he enjoyed more proving why something could not be done than accomplishing it.

* * * * *

This went on all the time. Whenever we got in a discussion he would draw upon the Book of the Ages to prove points in engineering or in practical management of an engineering project, and this was quite upsetting.

The testimony of Murray Sanders was in the same vein:

Q. Now, how long-standing was this discontent with productivity and attitude?

A. Last couple of years at least—after a while I realized that the amount of his work was somewhat below par. The quality of it was very high, so therefore I endeavored to get more work out of Cycowicz. However, as these things usually are, it was a lost cause. For the last year or two—I had been contemplating (letting) him go. For the last year or year and a half I had been attempting to let him go (and get) someone with his qualifications but one who wanted to work a little bit harder.

Some of Respondent's complaints were more specific. Evidence was introduced as to various projects where he failed to meet production schedules, and some of which led to customer complaints. The record also shows that during the last 40 weeks of his employment he was late reporting for work 52 times. In August 1961, Murray Sanders remonstrated with Cycowicz concerning repeated tardiness and threatened to have him punch a timeclock. Sanders backed down, however, when Cycowicz argued that this might make matters worse, and intimated that he might quit.

It is evident from the record that Albert Sanders, who had overall responsibility for production and was in close contact with Respondent's customers, was more convinced than his brother, and dating from an earlier period, that Cycowicz was unsuitable. In January 1962 Albert Sanders, exasperated by an excuse given by Cycowicz as to why he had not conferred with Feinstein, another engineer, on a production matter, told Cycowicz that if he worked for him (Sanders) he would discharge him. In the spring of 1961, Albert Sanders told Murray Sanders that he felt very strongly that Cycowicz should be let go and urged him to see about getting a replacement for him. Murray Sanders agreed and on May 1, June 28, and in October 1961, caused to run in the New York Times advertisements calling for a mechanical engineer to replace Cycowicz. The advertisements are in evidence. The responses, however, were disappointing and on November 28 or 29 Respondent engaged Sidney

Koran, a personnel consultant, who had previously recruited De Angelis for Respondent. According to the testimony of both Koran and Murray Sanders, which I credit, Sanders told Koran that Respondent was seeking a replacement for Cycowicz, with whom he expressed dissatisfaction, and hoped that anyone whom he recruited would have a "positive attitude" toward his work, with emphasis on productivity. Koran inserted classified advertisements in the Times on December 3, 10, and 17, 1961, and January 9, 1962.

The advertisement of January 9 was answered by one Alfred Hasler whom Koran interviewed on January 10 and found to be satisfactory. Accordingly, on January 17, Koran brought Hasler to Respondent's plant where he was interviewed by Murray Sanders who told Hasler that his references would be checked and that Sanders would keep in touch with him. Sanders next interviewed Hasler on January 23 and offered him the job at a salary of \$1,100 more a year than Respondent had been paying Cycowicz. Hasler tentatively accepted the offer. It was agreed that his then present employer should be given 2 weeks' notice and that Hasler and Sanders should meet again on January 26 to conclude arrangements with a view to his beginning work on Monday, February 5. On the following day Murray Sanders informed Albert Sanders that he had found a satisfactory replacement for Cycowicz and it was decided that he should be informed on Friday, February 2, that he was terminated and given 2 weeks' termination pay.

Hasler, however, broke his appointment for January 26 on the excuse of sickness, and on Tuesday, January 30, Hasler's wife called Murray Sanders and told him that Hasler had decided to decline Respondent's offer. The two Sanders brothers discussed the matter that day and decided to go ahead with their plans to let Cycowicz go on February 2 and to renew their efforts to obtain a replacement. Murray Sanders was to take over Cycowicz' duties in the meantime.

The above account is based upon the consistent, credited testimony of Murray Sanders, Albert Sanders, Koran, and Hasler. On Thursday, February 1, as has been related, Respondent received the Union's letter of the previous day informing Respondent that the Union had organized its technical engineering employees. Murray Sanders testified that the Union's letter "flabbergasted" him. Albert Sanders described it as a "bombshell." Both stated that they had no idea up to that time that the Union was engaged in organizing Respondent's technical staff. They decided to hold up Cycowicz' discharge, which was to have taken effect on the following day, and to consult counsel. Murray Sanders was due to be out of town the following week so the retention of counsel and a final decision as to Cycowicz was left to Albert Sanders. Albert Sanders consulted counsel on February 6 and was advised to proceed with Cycowicz' termination if sound management required it. Sanders accordingly discharged him on February 9.

Conclusions

Any finding that Cycowicz was discriminately discharged by Respondent in contravention of the Act must rest solely upon the concurrence of two events: The Union's letter of January 31 announcing the organization of Respondent's employees by the Union, and the discharge of Cycowicz, its most active supporter, on February 9. There is no showing in the record of any independent act of interference, restraint, or coercion,¹ or of any opposition to the Union expressed prior to the discharge.

I am convinced that the concurrence of these two events, frequently so persuasive in Board cases, is in this case only coincidental. I found both Murray Sanders and Albert Sanders frank and straightforward in their demeanor, and their testimony responsive and convincing. I credit their statements that they had no knowledge that the Union was organizing its employees prior to February 1, and there is no evidence that they did.

It is not controvertible that Respondent had for some time been seeking a replacement for Cycowicz with whose productivity as a project engineer it had become progressively dissatisfied. Respondent, beginning in May 1961, took initial steps to find a competent replacement and the last of November referred the task to an industrial consultant. This was a month before the Union began the organization of Respondent's employees. Hasler, Cycowicz' prospective successor, was interviewed and offered Cycowicz' job 2 weeks before receipt of the Union's letter of January 31.

It is understandable that the Union's letter, received the day before Respondent had planned to discharge Cycowicz, faced Respondent with a dilemma. Clearly, it risked a charge of unfair labor practice if it proceeded at this juncture with its

¹ The allegations in the complaint that Respondent, after Cycowicz' discharge, threatened employees with a reduction in payments under a profit-sharing plan is hereinafter discussed under separate heading

plan to discharge a member of the bargaining unit. Accordingly, it held the discharge in abeyance pending the advice of counsel.

It is apparent from the record as a whole that while Cycowicz was technically competent, his traits of personality militated against his productivity as an engineer and exasperated management, as illustrated by the testimony of Albert Sanders, previously set forth. Cycowicz exhibited some of these traits while on the witness stand. He was in turn unresponsive and eager, argumentative and opinionated. I found him engaging and intelligent and at no point untruthful or hostile. But the categorical was beyond him, and what he had to say was lost in the saying of it. I have no doubt that as a technical project engineer Respondent found him frustrating and that his personality traits, though subjective, were real and resulted in a substantial falling off in his productivity.

I conclude and find that Respondent discharged Cycowicz for legitimate business reasons and not because of his union membership and activity.

B. Alleged acts of interference, restraint, and coercion

Several witnesses called by the General Counsel testified that during the week prior to February 9 and after Respondent's receipt of a copy of the Union's representation petition filed on February 2, Albert Sanders discussed with them the Union's appearance in the plant and during the conversation stated that he had just hired a labor attorney at an expense of \$1,000 and that this would have to come "off the top" of Respondent's profit-sharing plan. Sanders admitted the substance of this attributed remark which he testified, and which I find, was in accord with the facts. Respondent's profit-sharing plan is set up in such a way that all profits over \$20,000 go into the plan. Its operation was a subject for discussion and, on occasion, for criticism among the employees. Sanders' explanation for his remark is that he thought dissatisfaction with the plan might have been the reason for bringing in the Union and he wished to point out that the money in the plan had been diminished by \$1,000 because of its advent. In the circumstances I do not find Sanders' statement to constitute a threat of reprisal, or to be interference, restraint, or coercion within the meaning of Section 8(a)(1) of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record, I make the following:

CONCLUSIONS OF LAW

1. The operations of Respondent occur in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Architectural & Engineering Guild, Local 66, American Federation of Technical Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, in discharging Izchak Cycowicz on February 9, 1962, did not engage in unfair labor practices as alleged in the complaint within the meaning of Section 8(a)(3) and (1) of the Act.

4. Respondent did not violate Section 8(a)(1) of the Act by threatening to reduce payments to employees from its profit-sharing plan if they designated the Union as their bargaining representative.

5. Contrary to the allegations of the complaint, Respondent did not commit unfair labor practices by interrogation of employees concerning their union membership or activity.

RECOMMENDATION

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that the complaint herein be dismissed.

J. R. Simplot Company and American Federation of Grain Millers, AFL-CIO. *Case No. 19-CA-2374. August 17, 1962*

DECISION AND ORDER

Upon charges duly filed by the American Federation of Grain Millers, AFL-CIO, herein called the Grain Millers, the General