**Allen Milk Company and its Agent, William H. Allen *and* Dairy, Bakery and Food Workers Local 379, Retail, Wholesale and Department Store Union, AFL-CIO.** *Case No. 9-CA-2613. February 27, 1963*

## DECISION AND ORDER

On November 30, 1962, Trial Examiner W. Gerard Ryan 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 attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

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

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

## ORDER

The Board hereby adopts as its Order the Recommended Order of the Trial Examiner.

[1] In its brief, Respondent contends that the amount of work remaining to be done by Fillingane at the time of his discharge would, because of the temporary nature of his duties, be limited to a 2-week period. Respondent therefore urges that the Trial Examiner's backpay award be modified accordingly. As this is a matter which can more appropriately be determined in compliance proceedings, the exception has no merit.

The Trial Examiner's recommendation that the backpay obligation of the Respondent include payment of 6 percent interest per annum is adopted However, for the reason given in his dissent in *Isis Plumbing & Heating Co.*, 138 NLRB 716, Member Rodgers would not grant any interest in this case.

## INTERMEDIATE REPORT AND RECOMMENDED ORDER

### STATEMENT OF THE CASE

This proceeding was held before Trial Examiner W. Gerard Ryan in Columbus, Ohio, on September 5, 1962, on the complaint of General Counsel and the answer of Allen Milk Company and its agent, William H. Allen, herein collectively called the Respondents, and individually called Respondent Employer or Company and Respondent Allen, respectively.[1] The issues litigated were whether the Respondents violated Section 8(a)(1) and (3) of the Act. The General Counsel and the Respondents participated in oral argument and filed briefs.

[1] The charge was filed on June 7, 1962. The complaint issued on July 20, 1962. Hereinafter, all dates refer to 1962, unless otherwise specified.

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

## FINDINGS AND CONCLUSIONS

### I. THE BUSINESS OF THE RESPONDENTS

The complaint alleged, the answer admitted, and I find that Respondent Employer 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 Ohio.

Respondent Employer is engaged at its plant in Columbus, Ohio, in the processing of milk and related dairy products for distribution and sale through its retail and wholesale routes and its dairy store which is also located in Columbus, Ohio.

During the calendar year 1961, which is a representative period, the Respondent Employer had an indirect inflow of goods and commodities in interstate commerce valued in excess of $50,000, which were purchased and received from enterprises located in the State of Ohio, which in turn had purchased and received the said goods and commodities directly from points outside the State of Ohio. During the said period the Respondent Employer's gross sales were in excess of $500,000. At all times material to the issues herein, the Respondent Employer is and has been an employer as defined in Section 2(2) of the Act, engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act, respectively.

At all times material to the issues herein, Respondent Allen is and has been the general manager and agent of the Respondent Employer acting on its behalf, and a supervisor as defined in Section 2(11) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

Dairy, Bakery and Food Workers Local 379, Retail, Wholesale and Department Store Union, AFL–CIO, hereinafter referred to as the Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

#### A. *The alleged violation of Section 8(a)(1)*

The complaint alleged that the Respondents interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them in Section 7 of the Act by the conduct of Respondent Allen in informing employee Harvey A. Fillingane that he was "finished" (terminated) for having treated Respondent Allen unfairly by signing a union card.

There is no evidence to support the 8(a)(1) allegation in the complaint that Respondent Allen informed employee Fillingane on June 5 that he was "finished" (terminated) for having treated Respondent Allen unfairly by signing a union card. Respondent Allen was called as a witness by General Counsel under Rule 43b and testified:

> Q. Didn't you also ask Mr. Fillingane at that time if you thought that he had treated you fairly by signing the card and not talking to you first?
> A. I don't recall that I said that, no.

There is no other evidence on this matter. Fillingane was not questioned as to whether Respondent Allen had made the alleged statement. I accordingly recommend that paragraph 5 of the complaint be dismissed.

#### B. *The violation of Section 8(a)(3) and (1)*

The complaint further alleged that in violation of Section 8(a)(3) and (1) of the Act the Respondent Employer on or about June 5, discharged Harvey A. Fillingane and thereafter refused to reinstate him because of his membership in, sympathy for, and activities on behalf of, the Union.

At all times material herein the Company and the Union had a collective-bargaining agreement covering its driver-salesmen. The agreement did not include employees in the Company's dairy bar.

The Company had a program whereby employees were hired as trainee salesmen and given training to fit them to be driver-salesmen when vacancies occurred

Fillingane was hired as a trainee on April 16. On that same day, Jim Myer, a driver-salesman, gave Allen a 2-week notice that he was going to quit on April 28. On April 21 Allen offered Myer's route to Fillingane. Fillingane worked 1 day on that route which was April 24 and then reported to Dick Morgan, the plant manager,

that he did not want the route and did not want to be a driver-salesman. Allen explained to Fillingane that no other jobs were open in the plant and he could not continue as a trainee since he did not want to be a driver-salesman. Allen informed Fillingane that he would keep him at the plant until the Company found a replacement for him as a trainee. On May 15, the Company found a replacement and hired Norman Garcia. On May 15, Allen told Fillingane the Company would have to terminate his employment at the plant as his duties were finished but he offered Fillingane a temporary job at the dairy bar to paint it inside and out and to clean up the grounds. Fillingane accepted and clearly understood that the job at the dairy bar was temporary. Fillingane worked at the dairy bar from May 15 until his discharge on June 5. The Company admitted that prior to June 5 it had no complaints as to Fillingane's work.

During the afternoon of June 5, Fillingane signed a card to join the Union and also signed an authorization for the Company to deduct his union dues. The card authorizing deduction of dues came to the attention of Allen during the afternoon. Fillingane was summoned to Allen's office. Allen told Fillingane that the checkoff card was ineffective since Fillingane was not in the unit of driver-salesmen. Fillingane, according to Allen's uncontradicted testimony, refused to discuss the situation except to tell Allen to take the matter up with the Union. Allen told Fillingane that Allen was running the Company and not the Union and then and there discharged Fillingane. Allen denied that he discharged him for signing the dues checkoff card or for signing a card to join the Union and contends that the only reason for the discharge was Fillingane's belligerent, insolent, and uncooperative attitude in refusing to discuss the matter and telling Allen to take the matter up with the Union. When Fillingane was discharged there was still work for him to have done.

The Respondent Employer contends that upon the above facts the complaint should be dismissed as the General Counsel has failed to prove by the required preponderance of the evidence any violation of the Act. Respondent's motion to dismiss the complaint upon which decision was reserved is hereby disposed of in accordance with the findings and conclusions which follow.

The General Counsel contends that the foregoing facts prove a violation of Section 8(a)(3) and (1) of the Act.

### Conclusions

The sequence of events on June 5, which culminated in Fillingane's discharge, began when Fillingane signed cards for membership in the Union and authorization for checkoff of dues. When the authorization for checkoff of dues came to Allen's desk, Fillingane was summoned to Allen's office where the discussion above referred to took place. Fillingane did not know that temporary employees were excluded from the bargaining unit, mistakenly thought the probationary period was 30 days; and was not aware that the Company had no obligation to check off his dues He further believed that if the checkoff card had been accepted he would have been a permanent employee and did not know whether other employees of the dairy bar had their union dues deducted When those subjects were opened up by Allen I believe it was natural for Fillingane to desire such problems to be referred to the Union as his representative as he was unfamiliar with the terms of the collective-bargaining agreement.

Allen may have associated Fillingane's reply to him to take the matter up with the Union as indicating a belligerent, insolent, and uncooperative attitude, but I do not accept it as the reason for the discharge. On the contrary, I believe and find the discharge was made because of Allen's resentment at Fillingane's execution of the checkoff of dues; his expectation that such dues would be deducted; and Fillingane's belief if the card was accepted he would have been a permanent employee. Such a discharge in the context of this case discouraged membership in the Union. On the basis of the entire record, I find that the Respondent Employer, Allen Milk Company, in discharging Harvey A. Fillingane on June 5, and not thereafter reinstating him, violated Section 8(a)(3) and (1) of the Act.

## IV. THE REMEDY

Having found that Respondent Employer has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent Employer discriminatorily discharged Harvey A. Fillingane on June 5, I shall recommend that Respondent Employer offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings that he may have suffered by payment to him of a sum of money equal to that which he

normally would have earned from the aforesaid date to the date of Respondent's offer of reemployment, less net earnings during said period. The backpay provided for herein shall be computed in accordance with the formula stated in *F. W. Woolworth Company,* 90 NLRB 289. Further, it will be recommended that Respondent pay interest on the backpay due Fillingane, such interest to be computed at the rate of 6 percent per annum, and utilizing the *Woolworth* formula to accrue commencing with the last day of each calendar quarter of the backpay period on the amount due and owing for such quarterly period and continuing until compliance with this recommendation is achieved. *Isis Plumbing & Heating Co.,* 138 NLRB 716.

Since the discriminatory discharge found herein goes "to the very heart of the Act" (*N.L.R.B.* v. *Entwistle Mfg. Co.,* 120 F. 2d 532, 536 (C.A. 4), and reflects an attitude of opposition by Respondent Employer to the self-organization of its employees, the commission of other unfair labor practices in the future, is reasonably to be anticipated from Respondent Employer's past conduct. Accordingly, in order to effectuate the policies of the Act, I shall recommend that Respondent Employer cease and desist from in any manner infringing upon the rights of employees guaranteed by the Act.

## CONCLUSIONS OF LAW

1. The Respondent Employer 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 the Act.
3 By discriminating in regard to the hire and tenure of employment of Harvey A. Fillingane, thereby discouraging membership in the Union, Respondent Employer has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
4. By thus interfering with, restraining, and coercing its employees in the exercise of rights guaranteed by Section 7 of the Act, the Respondent Employer has engaged 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 affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record of the case, I recommend that Respondent Employer, Allen Milk Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Dairy, Bakery and Food Workers Local 379, Retail, Wholesale and Department Store Union, AFL–CIO, or any other labor organization of its employees, by discharging employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer Harvey A. Fillingane immediate and full reinstatement to his former position or to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of his discharge in the manner set forth above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other data necessary to analyze and compute backpay.

(c) Post at its plant in Columbus, Ohio, copies of the notice attached marked "Appendix."[2] Copies of said notice, to be furnished by the Regional Director for

[2] In the event that this Recommended Order be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "Pursuant to a Decision and Order."

the Ninth Region, shall, after being signed by a representative of Respondent Employer, be posted by it immediately upon receipt thereof, and be maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Ninth Region, in writing, within 20 days from the date of receipt of this Intermediate Report, and Recommended Order, what steps it has taken to comply herewith.[3]

Paragraph 5 of the complaint should be dismissed.

[3] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent Employer has taken to comply herewith."

## APPENDIX

### NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in Dairy, Bakery and Food Workers Local 379, Retail, Wholesale and Department Store Union, AFL–CIO, or in any other labor organization of our employees, or in any other manner discriminate in regard to their hire or tenure of employment or any term or condition of their employment.

WE WILL offer to Harvey A. Fillingane immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination against him.

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

ALLEN MILK COMPANY,
*Employer.*

Dated_____ By_____
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, Transit Building, Fourth and Vine Streets, Cincinnati, Ohio, Telephone No. Dunbar 1–1420, if they have any question concerning this notice or compliance with its provisions.

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## J. Weingarten, Inc. *and* Retail, Wholesale and Department Store Union, AFL–CIO. *Case No. 16–CA–1671. February 27, 1963*

## DECISION AND ORDER

On November 7, 1962, Trial Examiner Eugene F. Frey issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent has engaged in certain unfair labor practices, but that these did not warrant remedial action, that the Respondent had not engaged in other unfair labor practices as alleged in the complaint,