

as the exclusive representative for the purposes of collective bargaining of our employees in a unit appropriate for the purposes of collective bargaining Said unit is

All employees at Respondent Dairy Farmers Transfer terminal at Decatur, Illinois, or at any place of business of J C Dudley, doing business as an individual, including all over-the-road drivers but excluding city drivers and mechanics, all office clerical employees, guards, and supervisors as defined in the Act

WILLIAM E MCCLAIN, D/B/A DAIRY FARMERS TRANSFER,  
*Employer*

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

J C DUDLEY, D/B/A J C DUDLEY COMPANY,  
*Employer*

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

NOTE —We will notify the above named employees, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Citizens Building, Fourth Floor, 225 Main Street, Peoria, Illinois, Telephone No 673-9061, Extension 282

**Jackanic's Reinforcing-Erectors, Inc. and Emil V. Niccoli Case**  
*No 6-CA-3327 April 18, 1966*

**DECISION AND ORDER**

On January 11, 1966, Trial Examiner Robert Cohn issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in certain unfair labor practices and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision Thereafter, the General Counsel filed exceptions to the Decision and a supporting brief, and the Respondent filed a brief in opposition thereto and in support of the Trial Examiner's Decision

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Zagoria]

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 Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modification

We agree with the Trial Examiner that Emil V. Niccoli's discharge was not violative of Section 8(a) (3) and (1) of the Act. We so find because in our view the record does not establish by a preponderance of the evidence that he was terminated because of his concerted activity in questioning his rate of pay under the collective-bargaining agreement.

On the one hand, resentment at his having raised the problem might be inferred as the motive for his discharge from the facts that he had previously worked for the Respondent and hence both his competence and shortcomings were known; the night before his discharge, Respondent's general foreman and general superintendent discussed Niccoli's procrastination in performing assigned tasks and proclivity to interfere with work by stopping to talk with other employees, but they decided to delay action to evaluate his performance the next day; yet he was terminated at or about 9 a.m., immediately after he complained about his rate through the Union, although insufficient time had elapsed to afford an opportunity to determine whether his performance was satisfactory.

On the other hand, there is a complete absence of any evidence of union animus or discriminatory intent. Indeed, there appears to be a well-established, satisfactory bargaining relationship between Respondent and the contracting union. Further, it is clear that Niccoli had been cautioned about his conduct by his foreman, he had been working only 2 days when the supervisory conversation concerning his disruptive influence took place, and it cannot be said that Respondent found his activities unobjectionable until he complained about his hourly rate. The only doubt is as to the testimony concerning a statement made at or about the time of the discharge by the owner of the Company, Jackanic, to Niccoli that he was "the fellow with the big mouth. I've heard all about you. You are fired. Get the heck off the job." However, this could equally be interpreted as referring to Niccoli's excessive talking with employees during working time as to his having raised the issue of his rate. It is therefore ambiguous, and without other evidence to shed light on its meaning, we are reluctant to conclude that Jackanic's comment indicates an unlawful intent.

In view of the above, we shall adopt the Trial Examiner's recommendation and shall dismiss the complaint in its entirety.

[The Board adopted the Trial Examiner's Recommended Order dismissing the complaint.]

#### TRIAL EXAMINER'S DECISION

##### STATEMENT OF THE CASE

This proceeding, with all parties present or represented, was heard before Trial Examiner Robert Cohn in Pittsburgh, Pennsylvania, on September 23, 1965, on a complaint of the General Counsel of the National Labor Relations Board, dated

July 27, 1965, and the duly filed answer of Jackanic's Reinforcing Erectors, Inc., herein called the Respondent. The complaint, based on a charge filed April 21, 1965, by Emil V. Niccoli, an individual, alleged in substance, and Respondent's answer denied, that the Respondent, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, discharged said Niccoli on or about November 5, 1964, because of his union and/or concerted activities.

On the entire record in the case, including my observation of the witnesses and their demeanor while testifying, and a consideration of the briefs filed with me by counsel for the General Counsel and the Respondent, respectively, I make the following

#### FINDINGS OF FACT

##### The Alleged Unfair Labor Practices 1

The events giving rise to the instant controversy occurred during the construction of a parking garage by Respondent on Stanwix Street, Pittsburgh, Pennsylvania, in November 1964.<sup>2</sup> One Raymond Korzenowski was Respondent's general superintendent on the job, and Louis Fiumara was general foreman. At the time there were approximately 12 to 14 ironworkers employed on the job, all of whom (including Foreman Fiumara) were members of the Union.<sup>3</sup>

Emil V. Niccoli, herein called the Charging Party, was hired by Korzenowski on November 3 to perform structural iron welding and reinforcing work on the job, which included the carrying and tying of rods "and any other thing that the pusher had in mind."<sup>4</sup>

There appears to be no dispute that Niccoli is a competent and experienced structural iron welder. However, it is equally undisputed that welding accounted for only a minor portion of Niccoli's job at the Stanwix site (approximately an hour each day), and that the majority of the time Niccoli was assigned by Fiumara to perform reinforcing work which, as above stated, consisted of securing, carrying, and placing of rods. This latter aspect of the work apparently did not appeal to Niccoli because when he was assigned to get rods by Fiumara, he would procrastinate along the way, stopping and talking to other workmen, including workmen of another employer on the job, The American Bridge Company. This conduct on the part of Niccoli resulted in Fiumara's speaking to him and cautioning him about wasting his and the other employees' time on several occasions on Wednesday, November 4.<sup>5</sup> Fiumara mentioned Niccoli's derelictions to Superintendent Korzenowski that Wednesday, but decision as to what, if anything, should be done about it was reserved.

Respondent's weekly payroll-ending date fell on Tuesday and the employees were paid for that week the first thing the following Thursday morning. Accordingly, Niccoli, who had commenced work on Tuesday, November 3, was due 1 day's pay when he reported for work on Thursday, November 5. It was Respondent's practice for Superintendent Korzenowski to distribute the payroll checks to all jobsites at the commencement of work on Thursday, and he did this on November 5—handing over the Stanwix garage checks to Fiumara who, in turn, distributed them to employees.

Niccoli received his check from Fiumara at approximately 8:30 or 9 a.m. that Thursday. Niccoli looked at the check and almost immediately noticed that, accord-

<sup>1</sup> There is no issue of jurisdiction or of labor organization. The complaint alleges sufficient facts which are admitted by Respondent's answer to establish and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that International Association of Bridge, Structural and Ornamental Iron Workers Local 3, AFL-CIO herein called the Union or Iron Workers is a labor organization within the meaning of Section 2(5) of the Act.

<sup>2</sup> All subsequent dates refer to 1964 unless otherwise indicated.

<sup>3</sup> The finding respecting Fiumara is based on a stipulation of counsel made subsequent to the close of the hearing and submitted to me. Said stipulation is approved and made part of the record herein by insertion in the formal exhibit file.

<sup>4</sup> Niccoli a long time union member had worked for Respondent in the previous September albeit apparently at another jobsite.

<sup>5</sup> Niccoli denied that Fiumara spoke to him about performing his work satisfactorily. However Fiumara's testimony is corroborated in this respect by General Counsel's witness Valentino Parise, the shop steward on the job. Under all the circumstances including Niccoli's demeanor on the witness stand which was not particularly impressive in view of his tendency toward arrogance I credit Fiumara and Parise.

ing to his calculation, he had been paid the wrong amount of money. That is to say, he had figured the amount by multiplying the number of hours worked the preceding Tuesday by \$4.87½ per hour (which was the Structural Iron Workers' pay), whereas he was actually paid at the rodman's rate of \$4.70 per hour under the collective-bargaining agreement between the Respondent and the Iron Workers.<sup>6</sup> Niccoli complained to Shop Steward Parise and Foreman Fiumara about the shortage. Parise advised that he did not think Niccoli was entitled to the higher rate because the job Niccoli was performing contained reinforced work and "to the best of [his] knowledge as long as [he had] been in the job, nobody ever got paid . . . structural pay for reinforcing." However, Parise telephoned the union office and spoke to the union secretary, the business agent not being in. Apparently the Union's secretary confirmed what Parise thought was the correct pay. Parise relayed this information to Niccoli and Fiumara, who was with Niccoli at the time.

Fiumara telephoned Korzeniowski who was apparently at another jobsite. They discussed Niccoli and reached a conclusion to discharge him. Approximately 30 minutes later Niccoli was paid a second check which included his pay for all time worked since Tuesday, November 3. As Korzeniowski handed Niccoli the second check he said "that is it, that is all I can say to you." Niccoli proceeded to get his belongings and turned in his protective hat. As he was leaving the premises, he encountered Parise again and asked where he could see the owner of the Company, Jackanic. Parise said "that is him going over there," and pointed him out. According to Niccoli's testimony, he had never seen Jackanic before and as he started over to where Jackanic was standing, the latter said "you are the welder, the fellow with the big mouth. I've heard all about you. You are fired. Get the heck off the job." Niccoli said, "yes, sir," and left.

#### Analysis and Concluding Findings

The issue in this case, simply stated, is whether Niccoli's discharge was "motivated by his complaint concerning his rate of pay under the contract," as contended by General Counsel, or whether it was for just cause; i.e., failing to perform his assigned duties, as contended by Respondent. The General Counsel's theory, as explicated in his brief, is that "an employee's complaint concerning his pay under the terms of a union contract constitutes protected concerted activity and that his discharge for registering such a complaint is violative of Section 8(a)(3) and (1) of the Act," citing *New York Trap Rock Corporation, etc.*, 148 NLRB 374, and *Merlyn Bunney and Clarence Bunney, Partners, d/b/a Bunney Bros. Construction Company*, 139 NLRB 1516. The argument runs that even though no other employee joined in Niccoli's complaint, the latter was asserting a claim which constituted an implementation of the collective-bargaining agreement between Respondent and the Union, and which was but "an extension of the concerted activity giving rise to that agreement." *Ibid.* at 1519. Although I have some doubts as to whether such a purely personal claim as the Charging Party was making in this case appropriately falls under the doctrine established in the cited cases, I will assume for purposes of decision that it does.<sup>7</sup> However it seems appropriate to point out that in both the cited cases, the activities of the charging parties therein were directed in greater part to bring about a change in the respective company's interpretation of a contractual provision which, while being beneficial to the charging parties, would also redound to the benefit of all employees similarly situated. Here, on the other hand, the complaint was a purely personal one and it is questionable, in my view, whether such a complaint could be appropriately classified as "implementing" the collective-bargaining agreement within the meaning of the *Bunney Bros.* doctrine.

But I do not rest my recommendation for dismissal of the complaint on this ground because I find and conclude, based on a consideration of all the evidence in the record, including the Charging Party's demeanor while testifying, that he was discharged because of his malingering on the job and impeding the progress of the

<sup>6</sup> See General Counsel's Exhibit 4, p. 6.

<sup>7</sup> I note that in the *New York Trap Rock* case, one of the complaints the charging party made in the case was "about the rate of pay applicable to his job," 148 NLRB 374; see also *B & M Excavating, Inc.*, 155 NLRB 1152. Cf. *Norge Division, Borg-Warner Corporation*, 155 NLRB 1087, where the Board stated "for purposes of decision here, we assume *arguendo*, although we find it unnecessary to decide, that Shepherd's and Stayers' simultaneous presentation of grievances *personal to them*, although undertaken outside the contract grievance procedures constituted 'concerted activity' for 'mutual aid and protection' within the contemplation of Section 7 of the Act." [Emphasis supplied.]

work, as Respondent contends. I have found, contrary to Niccoli's testimony, that he engaged in such conduct during the 2 days he worked for Respondent, and that he was cautioned about this on several occasions by his foreman.

It is true, as I have also found, that the final decision to discharge him did not come about until it was reported to the superintendent that Niccoli complained about his pay rate after having received his first check. General Counsel's case, therefore, appears to rest on the proposition that because Niccoli was discharged *after* engaging in some concerted activity, he was necessarily discharged *because* of such activity. I must reject this *post hoc ergo propter hoc* reasoning because I find no support in the record on which to base a finding that Respondent's action was impelled by other than strictly legitimate and normal considerations. The record seems clear to me, based on the Charging Party's own testimony, that he conceived himself to be (and probably is) an experienced and expert welder, that the job he was assigned to perform consisted, in addition to welding, of carrying and placing the rods, that he disliked the latter aspect of the work and not only neglected to perform it but also talked to other employees, thereby impeding their work. Certainly this is just cause for discharge and I do not understand the General Counsel to disagree, rather, he contends that since the decision for discharge resulted only after Niccoli raised his complaint about the pay rate, it must have been that consideration which motivated Respondent to perform the act. But there is not the slightest indication in the record that Respondent was motivated by antiunion considerations. All of the ironworkers, including the Charging Party, were members of the Union, there was a collective-bargaining agreement with the Union, and there is a complete lack of evidence of any statements or conduct by Respondent officials which could be characterized as antiunion. For aught that the record shows, Respondent was perfectly agreeable to allow Niccoli to process his grievance through the grievance procedure of the contract, but Niccoli admittedly did not pursue that route, probably because the Union's officials were in agreement with Respondent that the rate which Niccoli received was the correct one for the job he was performing. Accordingly, there is only one bit of evidence in the entire record on which General Counsel can rely in support of his contention of Respondent's animus against the Charging Party and that is, of course, the statement of President Jackanic, which took place after the discharge, wherein the latter referred to the Charging Party as "the fellow with the big mouth." General Counsel would presumably have me infer from that exclamation that Respondent was displeased with Niccoli because he complained about the pay rate. But the inference is just as reasonable that Jackanic was referring to Niccoli's excessive talk with other employees. Certainly in the absence of any other evidence of Respondent's antipathy toward the Union or Niccoli, we should not presume the unlawful rather than the lawful inference from such a vague and ambiguous remark.<sup>8</sup>

In sum, I conclude that the facts in the instant case are more akin to those in the *Yard Bird of Olympia Inc., d/b/a Sea-Mart Shopping Center* 155 NLRB 30 than to those in the cases cited by General Counsel, or any other case which I have uncovered by independent investigation. In that case, the union championed an employee who was complaining that she was not receiving the wage to which she was entitled under the collective-bargaining agreement, and raised the cudgel on her behalf with management on several occasions. However, it appeared that the employee was incompetent, that she was not worth, in fact, the wage which she was being paid, and the employer discharged her rather than agree to the union's demand. The Trial Examiner recommended dismissal although finding that the "union's demand for a higher wage entered into the discharge considerations." The Board, adopting the findings, conclusions, and recommendations of the Trial Examiner, noted that it was [the employee's] incompetence which occasioned her discharge "and the union's demand that [the employee] be paid the alleged contract rate, which would have been in effect a pay raise, simply magnified the nearly insoluble problem of finding a satisfactory position for her. In these circumstances, we find it was [the employee's] incompetence and not the union demand which caused her discharge."

Similarly, in the instant case, I find that it was the Charging Party's failure to properly perform his assigned duties, and not his wage complaint, which caused his discharge.<sup>9</sup> I shall therefore recommend dismissal of the complaint in its entirety.

<sup>8</sup> "An unlawful purpose is not lightly to be inferred." *NLRB v T A McGahey et al d/b/a Columbus Marble Works* 233 F 2d 406 (CA 5)

<sup>9</sup> See also *Traylor Pamco* 154 NLRB 380, *Norge Division Borg Warner Corporation supra*

## CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, 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. The Respondent has not engaged in the alleged unfair labor practices.

## RECOMMENDED ORDER

It is recommended that the complaint be dismissed.

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**The Monarch Machine Tool Company<sup>1</sup> and Local Lodge No. 996, of the International Association of Machinists and Aerospace Workers, AFL-CIO, Petitioner.** *Case No. 8-RC-6046. April 18, 1966*

## DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Bernard Levine.<sup>2</sup> The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

Upon the entire record in this case,<sup>3</sup> the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.
2. The labor organization involved claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Sections 9(c) (1) and 2(6) and (7) of the Act.
4. The appropriate unit.

The Petitioner's original petition sought a unit composed of all employees in the methods<sup>4</sup> and production control departments. At the September 8 hearing the Petitioner amended the unit description in its petition to read: "all clerical employees in the Methods and Production Control Departments, and all other unrepresented plant clerical employees."

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The original hearing in this matter was held on September 8, 1965. Thereafter, on September 24, 1965, the Regional Director for Region 8 issued an order reopening hearing, and, pursuant to that order a reopened hearing was held on November 3, 1965, and January 4, 1966.

<sup>3</sup> On January 17, 1966, the Employer filed a brief with the Board.

<sup>4</sup> Hereinafter called the industrial engineering department.