

NOTE.—We will notify Fred Forkner and James Andrews if presently serving in the Armed Forces of the United States of their 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, 327 Logan Building, 500 Union Street, Seattle, Washington, 98101, Telephone 583-4583.

Stiney's Corp., t/a Wolfie's and Local Joint Executive Board of New York City, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO and Culinary Workers of New York, Local 923, Retail, Wholesale and Department Store Union, AFL-CIO; Associated Food Shops, Inc., Parties to the Contract. *Case No. 2-CA-10522. June 10, 1966*

DECISION AND ORDER

On March 18, 1966, Trial Examiner E. Don Wilson issued his Decision 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 Trial Examiner's Decision. Thereafter, the General Counsel filed limited exceptions to the Trial Examiner's Decision; none of the other parties filed exceptions or briefs.

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 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 General Counsel's exceptions, and the entire record in this case, and hereby adopts the findings, conclusions,¹ and recommendations of the Trial Examiner.

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

¹ Conclusion of Law 4 of the Trial Examiner's Decision is amended to reflect our approval of the Trial Examiner's finding that the Respondent violated Section 8(a)(3) of the Act by unlawfully entering into a union-security agreement with Local 923.

While the Trial Examiner found that Respondent's agents Steinberg and Kay, as well as Sklar, solicited employees and prospective employees to become members of Local 923 in violation of Section 8(a)(1) of the Act, he did not, in his concluding findings, include the conduct of Steinberg and Kay. The General Counsel excepts to the Trial Examiner's failure to do so. We find merit in this exception and, therefore, find that, by this conduct, the Respondent further violated Section 8(a)(1) of the Act.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a charge filed March 3, 1965, by Local Joint Executive Board of New York City, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein the Charging Party, the General Counsel of the National Labor Relations Board, herein the Board, issued an amended complaint dated September 3, 1965, alleging that Stiney's Corp., t/a Wolfie's, herein the Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein the Act, by various conduct. The complaint was further amended at the trial so as to allege an additional violation of Section 8(a)(1) of the Act.

Pursuant to due notice, a hearing in this matter was held before Trial Examiner E. Don Wilson at New York, New York, on October 7, 8, and 11, 1965. General Counsel, Respondent, and Associated Food Shops, Inc., herein the Association and the Charging Party fully participated. Culinary Workers of New York, Local 923, Retail, Wholesale and Department Store Union, AFL-CIO, herein Local 923, chose not to participate.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a New York corporation operating a restaurant in New York City. During the past year Respondent caused to be transported and delivered to its restaurant goods and materials valued in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to the restaurant directly from States outside New York. The annual rate of Respondent's gross receipts was in excess of \$500,000.

Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material, the Association has been a New York membership corporation composed of employers engaged in operating restaurants and other related services in and around New York City. At all times material it has negotiated, executed, and administered collective-bargaining agreements on behalf of its employer-members with labor organizations representing employees of its employer-members.

II. THE LABOR ORGANIZATIONS

Local 923 at material times has been a labor organization within the meaning of the Act.

Credited testimony of Brickman establishes that nine New York City locals formed the Charging Party by direction of the International Union. One of the labor organizations forming the Charging Party was Local 1. The Charging Party is composed of three delegates from each Local and they elect the Charging Party's officers. The Charging Party organizes employees and negotiates collective-bargaining contracts with employers. I find the Charging Party is a labor organization within the meaning of the Act. However, it is sufficiently clear that it is a person within the meaning of the Act and as such it may file a charge as it did here.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

Did Respondent by entering into a union-security contract with Local 923, in late November 1964, violate the Act because Local 923 did not, at that time, or any time, represent an uncoerced majority of Respondent's employees; did Respondent, through its agents, beginning about December 9, 1964, and continuing through January 1965, vilify employees because they joined, assisted, or supported the Charging Party; during the same periods of time did Respondent warn and direct its employees to refrain from giving support to or remaining members of the Charging Party and threaten its employees with reprisals if they became or remained members of or gave support to the Charging Party; did Respondent unlawfully urge and solicit its employees to join Local 923; did Respondent unlawfully permit William Sklar, an agent of Local 923, to conduct Local 923's business on Respondent's premises, as Respondent's agent, during working hours; since November 23, 1964, has Respondent, through its agents,

unlawfully required all employees to pay initiation fees and dues to Local 923 as a condition of employment; did Respondent unlawfully interfere with its employees' union activities by discharging Ann Emerick?

B. Facts

Edward Steinberg was Respondent's principal stockholder and the prime director of Respondent. In past years, he had been a member of the Association and had had contracts with Local 923. He was a member of the Association, for many years before he began this enterprise, because it was easier through the Association to deal with one rather than three or more unions. The Association's contract was with Local 923. The vice president of Local 923, Sklar, was Steinberg's friend for many years.

Respondent opened its restaurant in the Bronx, New York, on November 26, 1964, Thanksgiving Day. For a period of at least some days before the opening and during and after the opening, Respondent had substantially the following sign placed in its front window for all prospective employees and customers to see:

R. W. D. S. U.
Culinary Workers Union
of New York
Local 923
AFL-CIO
UNION STORE

Ann Emerick credibly testified that on the Saturday before Thanksgiving she applied for work as a waitress and that, having seen the above sign, she was told by Steinberg that she would have to go to Local 923 and sign a union card before he could give her a job. She told Steinberg she was a member of Local 60, affiliated with the Charging Party, and Steinberg said he wanted to hear about no union other than Local 923 and she should sign a union membership card with that union and she would have a job. Emerick returned to Respondent's restaurant on the Monday before Thanksgiving and told Steinberg she had been to Local 923. She was then assigned her station.

Dorothy Cuddeback, employed at the time of the hearing as Respondent's cashier; credibly testified that on the Monday before opening day, Mr. Kay, an agent of Respondent, and the man who hired her, asked her if she would mind joining Local 923. He told her how to get there to sign up. She joined. She reported to work the day before Thanksgiving.

On the day before Thanksgiving, over 20 prospective or present employees were present. Local 923's representatives Sklar and DeAngelis, were present according to the credited testimony of Emerick. Mary Cereneck, still an employee of Respondent when she testified, credibly testified that everyone present signed up for Local 923 with Sklar and DeAngelis excepting for those who were already members.¹ Sklar's authority in the restaurant is evidenced by some conclusory testimony on which I do not rely. I do find, based upon direct credited testimony, that Respondent clothed Sklar with apparent authority to discuss pay and other working conditions with employees. Particularly in light of the union-shop sign displayed by Respondent, Sklar in his duties as a host was presented to employees as a representative of management. He advised employees as to their pay and other working conditions, in the presence of Steinberg and Kay.

It was but a few days after the opening and the activities of Sklar and DeAngelis in signing up employees in the restaurant that Respondent through the Association became party to the union-security contract with Local 923. This was on November 30, 1964.

Helen Gallagher, a member of Local 1 which is, in turn, a member of the Charging Party, was employed by Respondent on December 3, 1964. She and Emerick thereupon endeavored to organize the employees so that they would become members of Local 1. Emerick was more active than Gallagher. Their activity began on December 5, 1964. They were very successful and their activities were well known. On December 9, after Gallagher had a couple of days off, Steinberg, speaking to a companion in the presence of Gallagher, said in a raised voice, "Here comes one

¹ Cereneck and Cuddeback retained the services of Respondent's counsel to represent them as witnesses in this proceeding. I have evaluated their testimony in light of this very unusual situation.

of the troubleshooters now. I took her in off the streets. Now the two unions are going to get together and I am going to be stuck with Local 1." Gallagher ceased her employment that day. There is no complaint with respect to her termination. However, the next day, Steinberg said of Emerick in Emerick's presence, "Oh, there she is, the other street girl. I pick them off the street and this is what they do to me." Kay and at least two other employees were present. On the same day Sklar said to Emerick, "You know what happens to rats? You're a rat, and you'll get yours."²

Emerick's efforts to organize for Local 1 were curtailed by Steinberg. He gave her what General Counsel has described as "a hard time." He asked her to quit. He told her he did not want her as an employee. It was only after her Local 1 activities that Steinberg and Kay indicated a change from what had been a warm acceptance of her work. Her hours of work were changed in a manner unfavorable to her. Steinberg told her he was going to give her a real hard time no matter what it cost him, even if she went to the "Labor Relations Board." She was put in the worst work station. Steinberg gave directions for her to walk further to get food for her customers. Steinberg cursed her and asked her to quit. I have found Emerick a credible witness. I find that on the last day of her employment, Steinberg said to her, "You will make more money on the street than you would here. Why don't you get out?" This amply demonstrates to me what Steinberg meant when he referred to Emerick and Gallagher as ladies who were hired "off the street." I find the phrase not to refer to their method of hiring but rather to a description of them as being cheap and not possessed of virtue. I note that these remarks were not made until after Emerick and Gallagher engaged in activities in behalf of Local 1.

On February 6, 1965, Emerick appeared at work and wore a sweater which was not white. Credited testimony establishes that Respondent had a working or shop rule that all waitresses' sweaters be white. Whether Emerick knew of the rule is not important. Steinberg, as was his right, ordered Emerick to remove the non-white sweater. She refused his request. He repeated his request. She again refused. His third request to comply with a reasonable order was again refused. I find insufficient probative evidence that the repeated requests were occasioned by other than sound business judgment. After Emerick refused for the third time to remove the non-white sweater, Steinberg discharged Emerick. She refused to be discharged. There was then a fight during which Emerick delivered a hard slap to Steinberg. Emerick was then effectively discharged. I find that her discharge, whether the earlier or later one, has not been established by substantial evidence to have been caused by her pro- or anti-union activities. She was discharged because she refused a reasonable order of Steinberg and because she struck Steinberg. I note that Steinberg may have been delighted to see Emerick leave his employment. His delight does not make Emerick's discharge for ample cause an unfair labor practice.

C. Concluding findings

It is abundantly clear to me that anyone approaching and observing Respondent's store before and after it opened had an opportunity to read the "Union Store" sign displayed to the public, including prospective and present employees. Any employee, including a merely prospective one, would understand that Respondent had a collective-bargaining agreement with Local 923 and I find that since the sign advertised Respondent as a "Union Store," employees were told by Respondent's sign that membership in Local 923 was a condition of employment. This record reveals no evidence that the "Union Store" sign was ever removed. Since Respondent, at all times, through its sign, made plain to employees that they should be members of Local 923, employees' designations of Local 923 as collective-bargaining representative are nullities.

So, too, do I find that Local 923's and Respondent's activities, through Sklar and DeAngelis on the day before Respondent's opening, constituted interference, restraint, and coercion by Respondent. Especially considering the window sign and Sklar's activities as Respondent's host,³ the signing up of Respondent's employees with Local 923, on the day before opening day, was tainted with interference, restraint, and coercion. There are here no circumstances which permitted Respondent to use its premises and time so as to give Local 923 the opportunity to sign up as members

² I find he was still a representative of management.

³ Being a host at an opening such as Respondent's does not in itself prove agency. But Sklar in advising as to wages, etc. in the presence of Steinberg and Kay, and in view of the window sign, was Respondent's agent.

or applicants the employees of Respondent. Sklar and DeAngelis were signing up applicants for employment during the hiring process. Applicants for employment were not advised of their statutory right to refrain from activities in behalf of Local 923. The unlawful nature of the activities of Sklar and DeAngelis is emphasized by Respondent's direction to Emerick and Cuddeback to join Local 923.

Since Local 923 did not represent an uncoerced majority of Respondent's employees, it was violative of Section 8(a)(1) of the Act for Respondent to recognize and contract with Local 923 and it was a violation of Section 8(a)(3) and (1) of the Act for Respondent to enter into a union-security agreement with Local 923. I find no merit to Respondent's contention that it did not violate the Act by contracting with Local 923 because it joined the Association thereby making its employees part of the Association-wide unit. There is no evidence that Respondent's employees ever consented to become members of a bargaining unit larger than the presumptively appropriate single employer bargaining unit. By joining the Association, Respondent did not acquire the right to foist Local 923 upon its employees.

I find insufficient probative evidence that Sklar, as contended by General Counsel, was Respondent's supervisor within the meaning of the Act. Not only he but also many other friends of Steinberg acted as hosts in directing and seating customers on and after Thanksgiving Day. It is true that for a brief time, early in Respondent's operations, Sklar assigned some waitresses to tables and told some when they might take rest periods. It is clear that in assigning tables Sklar was in a position to affect the income of employees. This was for a very brief time and as such was not indicative of supervisory status, although along with other factors it spelled out his representative authority. In his capacity of host, he merely assigned customers to available tables, again during a very brief period of time. I have already found that particularly in light of Respondent's "Union Store" sign, Sklar's activities with Respondent's approval constituted him Respondent's agent at least in connection with his union⁴ and antiunion⁵ activities. Thus I find Respondent, through Sklar, during November 23 to 30, violated Section 8(a)(1) of the Act by soliciting employees and prospective employees to become members of Local 923. Respondent further violated Section 8(a)(1) of the Act by Sklar's December 10, 1964, statement to Emerick that she knew, "what happens to rats." Sklar's authority as agent had not been withdrawn and was in accord with Steinberg's activities with respect to Gallagher and Emerick for Local 1 participation.

I find that Respondent violated Section 8(a)(1) of the Act by changing Emerick's work station, changing, and reducing her hours of work, and otherwise giving her "a hard time." It further violated Section 8(a)(1) of the Act by referring to her and Gallagher as waitresses who had been taken off the street, thereby imputing impurity to them. This course of conduct followed their anti-Local 923 and pro-Local 1 activity and, in light of the entire record, was caused by such activity.

I find there is insufficient substantive evidence to establish that Emerick's discharge was caused by her anti-Local 923 or pro-Local 1 activities. I have no doubt that Steinberg was glad to see Emerick go but this, above, does not prove an unfair labor practice.

General Counsel has not established that Steinberg's orders to Emerick to remove her non-white sweater in accord with Respondent's legitimate rule, even if unknown to Emerick, were mere harassment. Emerick refused to follow a series of direct and legitimate orders. It is abundantly clear that in connection with Emerick's refusals to follow Steinberg's orders, she and Steinberg had a real "fight" during which Emerick struck Steinberg sharply across the face. I think it unnecessary to determine whether Steinberg's dentures were dislodged, broken, and knocked into the back of his mouth by the force of the blow. General Counsel seeks neither reinstatement nor backpay for Emerick. So do I find it unnecessary to determine whether Emerick was discharged shortly before or immediately after she struck Steinberg. I find she was discharged because she was contemptuous of Steinberg's direct and legitimate and repeated orders to remove her non-white sweater. Obviously, if the discharge occurred after she struck Steinberg, the striking was an added cause.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The operations of Respondent, described in section I, above, occurring in connection with the unfair labor practices described in section III, above, have a close,

⁴ Local 923.

⁵ Local 1.

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.

V. THE REMEDY

Having found that Respondent has engaged in certain 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.

It is plain from the record that Respondent's employees were coerced by Respondent to pay initiation fees and dues to Local 923 which did not represent them as their uncoerced choice. Each is to be made whole by Respondent paying each whatever he or she may have paid to Local 923 as initiation fee and/or dues.

Further, since Respondent's employees did not freely select Local 923 as their collective-bargaining representative, I shall recommend that Respondent be ordered to withdraw and withhold recognition from Local 923 as collective-bargaining agent until such time as Local 923 is certified. I shall also recommend that Respondent cease giving effect to or in anywise implementing the Local 923 contract, or any renewal or modification thereof.

Respondent's unfair labor practices strike at the heart of rights guaranteed employees by the Act. Unless appropriately restrained, there is reasonable ground to anticipate that Respondent, in the future, will infringe upon other rights guaranteed to employees. I shall, therefore, recommend an order requiring Respondent to cease and desist from infringing in any manner upon the rights guaranteed its employees by Section 7 of the Act.

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

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.
2. Local 923 and the Charging Party are each labor organizations within the meaning of the Act.
3. The Charging Party is a person within the meaning of the Act.
4. By recognizing and contracting with and granting union security to Local 923, as found above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act, including threats and solicitation and vilification, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
6. 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, it is recommended that Respondent, Stiney's Corp., t/a Wolfie's, New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Recognizing Local 923 as the exclusive representative of its employees for the purposes of collective bargaining, unless and until said labor organization shall have been certified by the National Labor Relations Board as the exclusive bargaining representative of said employees in an appropriate unit.
 - (b) Performing, enforcing, or giving effect to its contract with Local 923, or to any renewal, modification, or supplement thereof unless or until Local 923 shall have been certified as bargaining representative by the Board, provided, however, that nothing herein shall be construed to require Respondent to vary any substantive provisions of such agreement, or to prejudice the assertion by the employees of any rights they may have thereunder.
 - (c) In any other manner interfering with, restraining, or coercing its employees including threats, solicitation, and vilification, in choosing such labor organization as they may choose to represent them.
2. Take the following affirmative action designed to effectuate the policies of the Act:
 - (a) Pay to each employee whatever he or she may have paid to Local 923 in initiation fee and/or dues during his or her employment.

(b) Withdraw and withhold all recognition from Local 923 as the exclusive representative of Respondent's employees for the purposes of collective bargaining unless and until Local 923 shall have been certified by the Board as such exclusive representative in an appropriate unit.

(c) Post at its restaurant, and all other places where notices to its employees in New York, New York, are customarily posted, copies of the attached notice marked "Appendix."⁶ Copies of said notice, to be furnished by the Regional Director for Region 2, shall, after being duly signed by Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply therewith.⁷

⁶ In the event that this Recommended Order is 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 is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

⁷ In the event that this Recommended Order is 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 has taken to comply therewith."

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 National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT recognize Culinary Workers of New York, Local 923, Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive bargaining representative of our employees unless and until Local 923 is certified by the National Labor Relations Board, as the exclusive bargaining representative of our employees in an appropriate unit.

WE WILL NOT perform, enforce, or give effect to our contract with Local 923, or to any renewal, modification or supplement, unless Local 923 is certified by the National Labor Relations Board. However, we will not vary substantive parts of our agreement with Local 923 so as to prejudice the rights of any of our employees under said agreement.

WE WILL NOT in any other manner including threats, solicitation, or vilification, interfere with, restrain, or coerce our employees in choosing such labor organization as they may want to represent them.

WE WILL pay to each of our employees whatever he or she may have paid to Local 923 as initiation fee and/or dues.

WE WILL withdraw and withhold all recognition from Local 923 as the exclusive representative of our employees for the purposes of collective bargaining unless and until Local 923 shall have been certified by the National Labor Relations Board as the exclusive bargaining representative of our employees in an appropriate unit. However, this does not mean that employees may not assert their rights under the Local 923 agreement.

All our employees are free to become or remain members of any labor organization and they are also free to refrain from joining any union unless we enter into a valid union-shop contract with a union that represents them.

STINEY'S CORP., T/A WOLFIE'S,
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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 745 Fifth Avenue, New York, New York, 10022, Telephone 751-5500.