

Sears, Roebuck and Co. and its Sears Fashion Distribution Center and Local 148-162, International Ladies' Garment Workers Union, AFL-CIO. Case 22-CA-3016

March 20, 1968

DECISION AND ORDER

BY MEMBERS BROWN, JENKINS, AND ZAGORIA

On September 14, 1967, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in unfair labor practices as alleged in the complaint and recommending that the complaint be dismissed, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed cross-exceptions and a supporting memorandum, and an answering brief to the exceptions of the General Counsel and the Charging Party.

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.

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 modifications noted below.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts the recommendation of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed.

¹ In view of our determination herein, we find it unnecessary to pass upon the "comment" and statements of the Trial Examiner expressed in fn 3 of his Decision.

We correct the Trial Examiner's inadvertent misstatement of the number of employees under the supervision of Berardo to read "50 part-time and 25 full-time employees."

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Frederick U. Reel, Trial Examiner: This case,

heard at Newark, New Jersey, on June 12, 1967, pursuant to a charge filed the preceding February 14, an amended charge filed February 24, and a complaint issued April 20, raises the question whether Respondent discharged its employee Frederick Scotti for lawful reasons or because of his union activity, and—if the latter—whether the fact that Scotti during his employment by Respondent was also a paid organizer for the Charging Party renders inappropriate the customary remedial order of reinstatement and backpay.

Upon the entire record, including my observation of the witnesses, and after due consideration of the unusually helpful briefs filed by each of the parties, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY AND THE LABOR ORGANIZATION INVOLVED

Respondent, herein called the Company, is a New York corporation, which includes among its operations in several States the maintenance at North Bergen, New Jersey, of the "Sears Fashion Distribution Center," herein called the plant. The value of goods annually received at the plant directly from outside the State, and the value of goods annually shipped from the plant directly to points outside the State, each exceeds \$50,000. The pleadings establish, and I find, that the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act, as amended, and that the Charging Party, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Scotti's Employment Prior to the Start of the Union Campaign*

The Company hired Scotti November 14, 1966, as a receiving clerk under the supervision of Carmine Berardo. At this time, Scotti was also employed by the Union as a paid organizer, a fact of which the Company was unaware. He testified that his purpose in securing employment at the Company was "to organize and also to make some extra money."

Berardo supervised approximately 75 part-time and 50 full-time employees; Scotti was in the latter group. Scotti testified that he was hired as a "learner," and Berardo testified that he told Scotti it would take 30 days for him to prove that he could do the work. According to Berardo, Scotti showed early promise of developing into a valued employee, but on two occasions late in November Berardo had telephone calls from John Cordova, the head of the shipping department, that Scotti

was in that department talking to some employees. On another occasion, early in December, Berardo received a telephone call from John Prehodka, the distribution manager, complaining that Scotti was in *that* department talking to employees and had been doing so on several occasions. After the second call from Cordova and again after the call from Prehodka, Berardo spoke to Sotti, reproving him for leaving his work area.¹ Berardo testified that he received no more complaints about Scotti and none in the week preceding Scotti's discharge on December 16. After Prehodka's complaint, Berardo transferred Scotti to an assignment which restricted the possibility that Scotti would have occasion as part of his job to go into other departments.

B. *The Union's Campaign, the Company's Opposition, and Scotti's Prounion Activity*

Although Scotti spoke to employees about the Union during the latter part of November, the Company's first knowledge of the Union's organizing efforts apparently came early in December when the Union intensified its drive, and visited employees in their homes. In speeches delivered to the employees on Thursday, December 8, the Company made clear its strong opposition to the Union's effort to organize. Discussing one of these speeches with other employees, including one Hugh Coffee, Scotti suggested that they hear the Union's side. He accordingly arranged a meeting for early the following week at a nearby bakery, which was attended by Scotti, Coffee, and about eight other employees.

The morning after the meeting at the bakery (i.e., on December 13 or 14) Scotti asked Coffee on the way into work what the men thought of the Union, and Coffee replied that the men "didn't want any part of it" as they were "afraid" and did not "want to get involved." Later that morning Scotti saw Coffee speaking to the latter's supervisor, John Prehodka. A few minutes later Prehodka called Scotti over and told him to "stay away from his boys" or Prehodka would call the matter to the attention of Berardo, Scotti's supervisor. The record does not indicate that Prehodka did report this episode to Berardo.

Scotti testified that about a day and a half later, however, Berardo transferred him from his job receiving raincoats and suits, where he worked with several other employees, to a job nearer Berardo's door, where Scotti "was more or less isolated" although there were employees 20 to 30 feet away. Shortly after this, according to Scotti, he was shifted again to an area "where no one was around." Berardo testified that he moved Scotti at an earlier date after the complaint from Prehodka. I

credit Berardo in this respect, but it is clear that Scotti was given miscellaneous assignments during the last week when work slacked off, and some of these may have been in comparatively "isolated" places.

C. *Scotti's Discharge*

On Friday, December 16, the Company laid off most, but not all, its part-time employees for economic reasons. On this day the Company also let Scotti go, although as a full-time employee he would normally have been retained as long as part-time men were still on the payroll. Scotti was notified of his release in an interview in the office of Personnel Manager Harold Gregory, at which Scotti, Gregory, and Berardo were present.

Gregory told Scotti he was being laid off for want of work. When Scotti inquired if he would be called back when work picked up, Gregory for the first time mentioned that he had heard reports of Scotti's "wandering all over the plant" and said he "would not take back employees under those conditions."² Berardo testified that he recommended letting Scotti go at the time of the layoff of the part-time men because in view of the complaints during the 30 days of Scotti's employment Berardo felt he would not make a satisfactory employee. The Company noted on Scotti's employment record that he was released because of a "reduction in force."

D. *Concluding Findings*

During the first few weeks of Scotti's employment, and before the Company was aware of any union activity, Berardo received three complaints that Scotti was talking to employees in other areas of the plant. During the last week of Scotti's employment, when the Company was aware of the union movement, Berardo (according to his testimony) received no complaints about Scotti.

The question in the case is whether the discharge of Scotti was caused by the complaints Berardo had received or by Scotti's union activity.

Several factors militate in favor of the Company's position. Scotti had been employed only 5 weeks, and was thus completing the informal provisional 30-day period. The Company was laying off other employees at this time, although Scotti as a full-time employee would not ordinarily have been affected. And there is no direct evidence that the Company knew of Scotti's union activity at the time of his discharge.

This last statement poses the critical issue in the case. General Counsel argues that the Company must have known of Scotti's union activity. Other employees knew of it, and some at least believed (quite correctly) that Scotti was a union agent. But

¹ I do not credit Scotti's denial that Berardo reproved him

² Scotti denied that Gregory referred to the alleged "wandering," but I credit Gregory in this respect

Scotti's union activities, though well known to the employees, were not carried on openly before management. Nor can it be inferred that management surmised from Scotti's wandering about the plant that he was engaged in union activity, for the complaints Berardo received predated the Union's intensive campaign.

There remains for consideration the Coffee-Prehodka episode early in the week of Scotti's discharge. The day after the union meeting, Coffee expressed antiunion sentiments to Scotti, who then saw Coffee talking to his supervisor, Prehodka, after which Prehodka told Scotti not to bother Prehodka's employees. From this, General Counsel argues that Coffee told Prehodka about Scotti's pro-unionism, thus supplying the missing element of Company knowledge. Furthermore, so the argument runs, Scotti was promptly transferred to a more isolated job to keep him from talking to other employees. On the other hand, Berardo testified that he received no complaint from Prehodka at that time, and Berardo places the moving of Scotti to an earlier period, admitting that it was done to keep Scotti from going to other departments to talk to employees. As noted, I credit Berardo. Similarly Prehodka places his telephone report to Berardo about Scotti as occurring before the Coffee episode, and an oral report to Berardo (which the latter did not recall) as occurring still earlier. And accepting Scotti's testimony, Prehodka's statement to "stay away from" Prehodka's men could refer to Scotti's practice in previous weeks of visiting in Prehodka's department.

General Counsel has undoubtedly established suspicious circumstances. An antiunion employer

has discharged a prounion employee early in the union campaign. The ground relied on for discharge was not stated to the employee until he asked if he would be rehired, and does not appear as the reason shown on the Company's records. The Company admits that it had received no complaints about the offensive conduct, alleged to be the cause for discharge, in the week preceding the action. Unfair labor practice findings have been made and sustained on nothing more than that. But the employee was in a "trial" status, and had been the subject of managerial complaints predating the Company's awareness of union activity. Moreover, the element of company knowledge must rest on inference for Coffee was not called as a witness. Recognizing that direct evidence of a purpose to violate the statute is rarely obtainable, and that the burden of proof may be carried by circumstantial evidence from which reasonable inferences may be drawn, I nevertheless conclude—with considerable misgivings—that General Counsel failed to carry the burden of establishing company knowledge of Scotti's union activity, and that the complaint should be dismissed.³

CONCLUSIONS OF LAW

The Company has not engaged in the unfair labor practice alleged in the complaint.

RECOMMENDED ORDER

The complaint should be, and hereby is, dismissed.

As the Board or higher reviewing authority may disagree with this dismissal, I append comment on two matters which I would reach were my basic conclusion otherwise.

1 I would find the discharge, if unlawful, violative of Section 8(a)(3) as well as of 8(a)(1). Although the complaint referred only to the latter section, the failure to refer to Section 8(a)(3) does not preclude a finding that that section was violated. See *ANPA v NLRB*, 193 F 2d 782, 799-800 (C A 7), cert denied 344 U S 16, *NLRB v Pecheur Lozeng Co., Inc.*, 209 F 2d 393, 402 (C A 2), cert denied 347 U S 953, *Frito Company v NLRB*, 330 F 2d 458 (C A 9), *Independent Metal Workers Union*, 147 NLRB 1573, 1576-77. The facts relating to Scotti's discharge were fully litigated, and the question whether, if unlawful, the discharge violated Section 8(a)(3) as well as 8(a)(1) is therefore properly before me under the cases cited. The theory of General Counsel in limiting the complaint to Section 8(a)(1) was that Scotti as a paid union organizer was not a bona fide employee so as to be protected by Section 8(a)(3), but that as he appeared to be an ordinary employee his discharge for union activity tended to interfere with other employees' exercise of their Section 7 rights under such cases as *NLRB v Talladega Cotton Factory, Inc.*, 213 F 2d 208, 216-217 (C A 5).

I find, however, that Scotti was a bona fide employee. The fact that he was also paid by the Union to organize does not militate against that find-

ing. If, for example, Scotti had used his free time as an employee to sell products to other employees, and had been paid by another employer to do so, this would not have affected his status as an employee of the Company. The case would be different if Scotti had been "planted" by a rival employer intending to harm the Company's business, but while the Company may view the Union in no better a light, certainly under this statute it is not appropriate to view the two as adversaries in that sense. The General Counsel cites *NLRB v Ehas Brothers Big Boy, Inc.*, 327 F 2d 421 (C A 6), as holding that a paid union organizer is not a bona fide employee of the employer whose employees he is trying to organize. The court does indeed announce such a result, although the statement may be *obiter dicta* (like this entire footnote) as the court also sets aside the Board's credibility determinations. As long as the employee gives a full day's work to his "regular" employer, the fact that he renders services in other hours to the Union does not affect his employee status, whether such latter services are paid or not. Of course, if he seeks only temporary employment in order to organize, and withholds from his employer the fact that he seeks only temporary employment, a different result might follow, but no such showing is made on this record.

2 For reasons just indicated, I would, if I found the violation, accede to Charging Party's request and recommend reinstatement and backpay.