

R & E Transportation Corporation and Russell A. Girard. Case 28-CA-2029

February 4, 1971

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND BROWN

On October 8, 1970, Trial Examiner George Christensen issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the alleged 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 Charging Party filed exceptions to the Trial Examiner's Decision with supporting brief.

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 brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

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

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Trial Examiner: The complaint in this case issued on March 16, 1970,¹ alleging that R & E violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act), by threatening Girard with discharge if R & E's drivers secured union representation and by discharging Girard subsequently because of his efforts to persuade R & E drivers to secure union representation.

Receipt of the charges, jurisdiction, that Edward W. Bell was the manager of R & E and its supervisor within the meaning of Section 2(11) of the Act at all pertinent times,

¹ The original charge was dated January 19, 1970, an amended charge was filed on March 18, 1970 (2 days after the complaint issued) The complaint was amended at the hearing to include an allegation of proper service of the amended charge on the Company on the date it issued.

and that R & E discharged Girard on August 12, 1969,² and has refused to reinstate him at all times subsequent, are not disputed.

The issues joined are:

1. Whether Bell was an agent of R & E acting on its behalf with regard to various actions attributed to him;
2. Whether Charles A. Sanford was R & E's supervisor and agent at the time he allegedly threatened Girard with discharge if R & E's drivers supported a union;
3. Whether Sanford made the alleged threat just described;
4. Whether R & E discharged Girard for seeking to persuade its drivers to secure union representation.

A hearing was held at Tucson, Arizona, on May 12 and 13, 1970, at which all parties appeared by counsel and were afforded full opportunity to present evidence, examine and cross-examine witnesses, argue³ and file briefs. Briefs have been submitted by all parties. Based upon his review of the entire record, observation of the witnesses, perusal of the briefs and research, the Trial Examiner enters the following:

FINDINGS OF FACT

I JURISDICTION

The jurisdictional facts and the qualification of R & E as an employer engaged in commerce in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act is conceded and the Trial Examiner so finds.

II THE UNFAIR LABOR PRACTICES

A. Background

R & E shares a yard, garage, and trailer-office in Tucson with Tucson Transit Corp. (TTC). Both corporations are wholly owned subsidiaries of American Transit Corp. of Miami, Florida (ATC). R & E commenced its operations in June. Prior to that time (in April) TTC's drivers decertified the Amalgamated Transit Union (ATU) as their collective-bargaining representative, inasmuch as by that time most of the drivers employed by TTC were striker replacements hired subsequent to a strike called by the ATU in April 1968. While the TTC drivers sought advice from the Teamsters Union in securing the ATU's decertification, they did not seek or secure Teamsters representation subsequent to the decertification.

Girard and the other drivers who formed the original driver complement at R & E in June were transferred over from TTC. They all had been hired by TTC subsequent to the April 1968 strike as striker replacements.

R & E's sole customer at all times pertinent here was the Gulf American Corp. (GAC). GAC contracted with R & E to transport prospective purchasers of GAC property in the Tucson area between the airport, their hotels, restaurants, development sites, and on tours to points of general interest in the area. GAC tour guides and tour supervisors rode the

² Hereafter all date references excluding the year refer to 1969.

³ The Company at the outset of the hearing moved for summary dismissal on the ground a prior ruling by the Arizona Employment Security Commission denying Girard unemployment compensation based upon findings he was discharged for cause constitutes *res judicata* as to the reason for Girard's discharge in a previous forum of his choosing. The Trial Examiner reserved ruling thereon. The motion is denied inasmuch as Girard's alleged union activities were neither raised nor litigated in that proceeding. The Company also moved to dismiss at the close of the General Counsel's presentation of evidence and immediately prior to the close of the hearing. The Trial Examiner reserved ruling thereon. That motion is disposed of by the decision in this case.

buses with R & E's drivers and the sales prospects, extolling the beauties of the area and particularly the GAC developments. They also directed the drivers as to the routes to be taken, stops, etc.

Initially (operations commenced in June) the tour guides split any tips received from the sales prospects with the drivers and, when meal stops were made, the drivers ate with the sales prospects and tour guides at GAC's expense. By July, R & E employed six drivers in its operations—Warren Curtis, Joe Dorsey, Keith Melvin, Gary Barnett, Marvin Browning, and Girard. At times pertinent to this proceeding, Mrs. Anderson was GAC's flight director; Rudy Robbins and Leo Medigovich were tour guide supervisors for GAC.

B. *The Supervisory and Agency Status of Bell and Sanford*

Bell acts as the manager of both R & E and TTC and is paid a single salary by ATC, the parent corporation. He directs the work forces of both R & E and TTC, keeps the books for both corporations, hires and fires the drivers of both corporations, and administers a common labor policy. As earlier noted, he conducts his business from a single office and reporting room in a trailer to which the drivers of both R & E and TTC report. The dispatchers are also housed in the trailer. Sanford, while on the payroll of TTC and classified as its superintendent, nevertheless acted as a dispatcher for R & E, taking telephone requests from GAC for drivers and buses and dispatching R & E drivers and buses to cover the requested services. The R & E drivers accepted and complied with such orders from Sanford.

While R & E denied that Bell was an agent for R & E and further denied that Sanford either was a supervisor or agent for R & E, it did not pursue these contentions in its briefs.

On the basis of the facts recited above, the Trial Examiner finds and concludes that both Bell and Sanford were supervisors and agents of R & E acting on its behalf at all times pertinent to this proceeding.

C. *The Alleged Sanford Threat*

Girard testified that on either July 27 or 28, Sanford addressed him at the R & E trailer (without anyone else present) and, without any preliminaries, told him that if R & E's drivers got a union in and went on strike, the same thing would happen that had happened when the TTC drivers struck TTC in 1968, i.e., "we'll drive ourselves, the supervisors in Tucson, and we'll keep those buses rolling, and you guys will lose your lobs just like the other fellows did."

Sanford flatly denied the statement. He testified that he did not drive any TTC buses while the TTC drivers were on strike, that any talk of union organization among the TTC drivers ceased after the April decertification of the ATU, and that he never heard any discussion of union organization among R & E drivers at any time.

Sanford impressed the Trial Examiner as a direct and forthright witness; his testimony that he, though a TTC supervisor, did not drive any TTC bus during the ATU strike is unrefuted; this makes it highly unlikely that Sanford would state that the supervisors, including Sanford, would man R & E buses if the R & E drivers joined a union and engaged in a strike. Girard's credibility is further undermined by Curtis' testimony that the visit of Dorsey and Barnett to the Teamsters occurred in the course of securing information on means for decertifying the ATU in April or May, and related to the period they (the R & E drivers) were employees of TTC, not R & E (Girard testified the R & E

drivers dispatched Dorsey and Barnett to the Teamsters to pick up authorization cards within the 2 weeks preceding his August 11 discharge).

On the basis of the foregoing, the Trial Examiner discredits Girard's testimony to an alleged threat by Sanford on July 27 or 28 as related heretofore and credits Sanford's denial that he made the statements alleged to have been made by him that date.

The Trial Examiner therefore shall recommend dismissal of the 8(a)(1) allegations of the complaint.

D. *The Motivation for Girard's Discharge*

Girard worked for R & E for a period of approximately 2 months, from early June when R & E commenced operations to August 11, when he was discharged. He expressed dissatisfaction with his job during that period both to his fellow employees and to management.

Over the entire period of his R & E employment, Girard constantly complained to the other drivers during the periods they spent together awaiting the return of GAC's sales prospects at the various points they left the buses to view GAC's properties, historical or scenic sites, etc. His complaints generally centered on the irregularity of their hours, the constant schedule changes, often on short notice, long hours, poor pay, the conduct of the tour guides, the poor food provided by GAC, etc. He often commented that the R & E drivers "ought to get a union."⁴

Sometime in July, when Bell telephoned Girard to notify him of a schedule change, Girard stated an intention to call Rudy Robbins, GAC's tour guide supervisor, and tell him off about the schedule changes. Bell replied this was a sure way to lose his employment with R & E.

Girard also manifested his displeasure to GAC's representatives. During the month of July, before GAC tour guides, sales prospects, and other R & E drivers, Girard spat out food provided at GAC's expense and on several occasions referred to the meals as "garbage," "tainted" and "unfit to eat"; Girard also took at least one tour guide to task before sales prospects over opening the bus door to allow prospects to board his bus, and complained to Mrs. Anderson, GAC's flight director, over alleged failure of the tour guides to fairly split tips received from prospects opening bus doors. A result of this complaint was a change of policy to require splits only when tips were received on the bus, with no split of tips received off the bus.

Robbins expressed concern over Girard's attitude and the bad impression this created on GAC's sales prospects to drivers Dorsey and Melvin sometime in July. Robbins also advised Bell that if the food complaints did not cease, the drivers would lose their free-food privilege. This warning was passed on to the R & E drivers by Bell. Robbins also asked Bell to straighten Girard out, that he was creating bad feeling between the tour guides and the drivers, and had a bad attitude toward his job.

About August 5, four of the six R & E drivers—Barnett, Curtis, Dorsey, and Browning—approached Bell and complained that Girard was disrupting their good relations with GAC, jeopardizing several privileges they had enjoyed, and that they were weary of his constant griping and did not want to work with him.⁵ Bell was noncommittal.

⁴ Barnett and Dorsey's mutually corroborative testimony to the general nature of Girard's references to "getting a union" to resolve his gripes is credited and appears reasonable in view of the fact all of R & E's drivers used the Teamsters only to secure decertification of their previous representative at TTC and were strikebreakers at the time

⁵ Barnett and Dorsey's mutually corroborative testimony that no mention

(Continued)

On August 8, GAC tour supervisor, Leo Medigovich, advised drivers Girard, Melvin, and Curtis they would not be fed with the sales prospects and tour guides at GAC's expense at the Statler-Hilton lunch stop.

At Girard's suggestion, the three then went out to a bus and drove some distance away for their lunch, knowing full well that they could not return by the scheduled departure time. The tour guides and sales prospects thus finished lunch about 15 minutes before the drivers' return and were milling about the front of the hotel awaiting transportation. Medigovich telephoned R & E's dispatcher and complained over the wait.

Sometime previous GAC had changed part of the route for a stretch between Route 19 and Nogales Highway. The buses formerly had taken the Valencia cutoff between the two. It was decided that Pima Mine Road was a better route than Valencia, inasmuch as the former was scenic and lush and would help the guides in picturing the area favorably, while the latter was dry and barren. Girard did not like to take the former route because of a narrow, one-way bridge which he thought was unsafe. However, mine trucks and other buses regularly had utilized the bridge, including other R & E buses. Girard was driving the lead bus with Medigovich aboard on August 8. When Medigovich noted that Girard intended to take the Valencia cutoff, he sent a tour guide forward to tell Girard to continue on to the Pima Mine Road. Girard shrugged and continued onto the Valencia cutoff and continued on it to Nogales Highway.

The following day (Saturday, August 9) dispatcher Parker advised Girard, Curtis, and Melvin of Medigovich's complaint. They stated that the customers were half through lunch when they were told they would not be fed by GAC and the coffee shop at the hotel was too expensive for them.

The next day (Sunday, August 10) Robbins telephoned Parker and demanded Girard's discharge. He stated that Girard was causing too much disharmony and referred to the August 8 incident where the guides and sales prospects had to wait beyond the scheduled departure time because Girard drove elsewhere for lunch, Girard's public chastisement of a tour guide for opening a bus door to allow sales prospects to board and Girard's failure to take the Pima Mine Road as directed.

Bell was out of town on August 10 but was informed of

was made in the conversation of any effort by Girard to secure union representation as a basis for their hostility towards him is credited; it is clear their hostility was generated primarily by the fear Girard's actions might cause cancellation of the GAC contract and consequent loss of their jobs, plus resentment over restriction of their free meal privileges and reduction in their potential tip income due to Girard's conduct

Robbins' call the next day. On completion of his scheduled work that day (Monday, August 11) Bell told Girard he was discharged. Bell informed Girard that he was jeopardizing the R & E-GAC contract by his conduct, referring to the Pima Mine Road incident and the animosity both the GAC tour guides and the other R & E drivers had towards Girard. Girard asked him if the discharge was due to his previous wage garnishments. Bell replied that it was not. Girard asked if he could go back to work for TTC⁶ and Bell replied that he could not in view of the bad feelings of the drivers against him (the TTC and R & E drivers were in frequent, close contact).

On the basis of the foregoing, the Trial Examiner finds and concludes that the motivating factor for Girard's August 11 discharge was his troublemaking proclivities, which not only generated hostility among GAC's tour guides, thereby threatening continuance and/or renewal of R & E's contract to transport its sales prospects, but also created a morale problem among R & E's drivers.

The Trial Examiner therefore also shall recommend dismissal of the 8(a)(3) allegations of the complaint (as well as the 8(a)(1) allegations associated therewith).

CONCLUSIONS OF LAW

1. R & E is an employer engaged in commerce in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. R & E did not on or about July 19 by its agent Sanford threaten Girard and his fellow drivers with discharge for supporting a union.
3. R & E did not discharge Girard on August 11 because he engaged in protected, concerted activities.
4. Respondent has not violated the Act as alleged in the complaint.

RECOMMENDED ORDER

On the basis of the foregoing findings and conclusions, and upon the entire record in the case, the Trial Examiner recommends that the entire complaint be dismissed.

⁶ This was Girard's only request for return to TTC employ; about a month after going to work for R & E, Girard asked Bell only if it would be possible to return to TTC employment and was informed it was possible, provided Girard stayed on the job at R & E until a suitable replacement was secured.