In the Matter of NATIONAL CASKET COMPANY, INC. *and* CASKET MAKERS UNION 19559

Case No. C-11

SUPPLEMENTAL FINDINGS OF FACT CONCLUSIONS OF LAW AND RECOMMENDATION

April 10, 1939

STATEMENT OF THE CASE

On June 20, 1936, after a hearing, the National Labor Relations Board, hereinafter referred to as the Board, issued a Decision in this case [1] in which it found that National Casket Company, Inc., herein called the respondent, had engaged in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. The unfair labor practices so found consisted in discrimination against seven of the respondent's employees in regard to hire and tenure of employment, thereby discouraging membership in a labor organization known as Casket Makers Union 19559, hereinafter called the Union. The Board ordered the respondent to cease and desist from such practices, and to reinstate to their former positions, with back pay, the employees found to have been discriminated against.

Pursuant to Section 10 (c) of the Act, the Board, on or about August 18, 1937, petitioned the United States Circuit Court of Appeals for the Second Circuit, herein called the Court, for enforcement of this Order. On or about December 10, 1937, the Board filed a motion that the case be remanded to itself for further proceedings, in which counsel for the Board and for the respondent should have opportunity to adduce evidence and testimony, and to cross-examine with respect thereto, on the question of the availability of positions or employment in the respondent's Oneida, New York, plant during

[1] 1 N. L. R. B. 963. That Decision contains a statement of the proceedings prior thereto.

or subsequent to the period of the respondent's refusal to reinstate the persons named in the complaint issued by the Board, and for no other purpose. On December 13, 1937, the Court granted said motion and remanded the case to the Board for further proceedings in accordance therewith.

Pursuant to notice, duly served upon the respondent and the Union, a hearing was held on April 25, 1938, at Syracuse, New York, before Elliott L. Biskind, the Trial Examiner duly designated by the Board. The Board and the respondent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issue stated in the Court's order was afforded to the parties. During the hearing the Trial Examiner made certain rulings on the admissibility of evidence, which will be considered subsequently in this Decision.

On or about July 2, 1938, in pursuance of a Board order, the Trial Examiner filed his Intermediate Report on the record in which he found, on the basis of the testimony and other evidence taken at the hearing, that there were positions or employment available in the respondent's plant at Oneida, New York, during or subsequent to the period of respondent's refusal to reinstate the persons named in the complaint issued by the Board.

On or about July 15, 1938, the respondent filed exceptions to the Intermediate Report. On September 27, 1938, counsel for the respondent, in support of the exceptions, presented oral argument before the Board in Washington, D. C. The Board has considered these exceptions and finds them to be without merit.

Upon consideration of the entire record made in the case, the Board hereby makes the following:

Supplemental Findings of Fact

I. AVAILABILITY OF POSITIONS OR EMPLOYMENT

We address ourselves to a consideration of the evidence bearing upon the sole issue involved in the second hearing, whether there were positions available in the Oneida plant of the respondent during or subsequent to the period of respondent's refusal to reinstate the employees involved in the complaint. Harrington was refused reinstatement on July 9, 1935, while the rest of the employees involved were refused reinstatement on or before August 19, 1935. As shown by the figures contained in Board Exhibits 2–b and 2–c,[2] properly

[2] Reproduced in the former Decision at pp. 968–9 of Volume 1.

introduced in evidence at the second hearing, the number of employees in the departments in which the employees concerned were employed before their discharge, increased during the period in question.

Likewise, in Board Exhibit 2–a,[3] duly introduced at the second hearing, is set forth a list of employees hired during the period immediately preceding and following August 19, 1935, to do substantially the same work done by the employees discharged. That there were vacancies for the employees discharged during the period involved becomes clear from an examination of the testimony of William A. Knaus, manager of the respondent's plant at Oneida, concerning the jobs which the new employees were hired to fill. Classified according to the individual employees involved, the evidence and findings are as follows:

John R. Brooks

John R. Brooks had worked for the respondent for 7 years. His work consisted of trucking and rubbing. The following men were hired by the respondent to do work which was the same as or comparable to that formerly done by John R. Brooks: Raymond F. Muller, hired on August 20 as a helper trucker; John Contarz, hired on September 12 as a helper trucker; Wellington Fawcett, hired on September 20 as a trucker; Leland F. Mason, hired on December 18 as a trucker; and Sidney W. Warren, hired on January 29, 1936, as a helper trucker. John R. Brooks was as qualified as the new employees to do the work for which they were hired.

Clarence D. Snyder

Clarence D. Snyder, who had been in the employ of the respondent for over 20 years, was engaged principally in the work of brush varnishing. However, he also did sandpapering and rubbing. The following men were hired to do work, the same as or comparable to that formerly performed by Snyder: Cornelius Crowe, hired on August 27, for the lumber yard but subsequently transferred to spray helping; Harry Saltzman, hired on October 4 as a spray helper; Earl Mattraw, hired as a finisher on October 1; and Fritz Kreiner, hired October 7 as a finisher and stainer. The work of staining and finishing is similar to that of varnishing and rubbing done by Snyder prior to his discharge. Snyder was as qualified as the new employees to do the work for which they were hired.

George W. Brooks

George W. Brooks had been in the employ of the respondent for 31 years. He worked in the staining and filling department, which

[3] Reproduced in the former Decision at p. 969.

he operated on a contract basis. It is evident that the newly hired employees already mentioned under Snyder's case did work which was the same as or comparable to that done by George W. Brooks. Finishing and staining is the same as or similar to the work which was formerly done in the staining and filling department. George W. Brooks was as qualified as the new employees to do the work for which they were hired.

Leo F. Schmutz

Leo F. Schmutz had been in the employ of the respondent for 15 years. He was a rubber in the varnish department doing touching-up work. Crowe, Saltzman, Mattraw, and Kreiner, already mentioned, were doing work which was the same as, similar or comparable to that which had formerly been done by Schmutz. Rubbing and touching-up work is similar to staining and fishing. Schmutz was as qualified as the new employees to do the work for which they were hired.

Fred W. Corbin

Corbin had been employed by the respondent for 3 years as a cabinet maker in the cabinet department. Before his discharge he was promoted to the job of inspector. The following cabinet makers were hired by the respondent to do work which was the same as or comparable to that done by Corbin: Frank Brewster, hired on September 3; Victor Walzak, hired on October 7; and Barney Walzak, hired on January 20, 1936. Corbin was as qualified as the new employees to do the work for which they were hired.

Anson Harrington

Harrington had been employed by the respondent for 17 years and for a number of years had been a stock cutter. He was also experienced as a tailer and operator on the stock saw, ripsaw, planer, and pony planer. The following men were hired to do work which was the same as or comparable to that done by Harrington: Hubert Boyles and William Flanagan, hired on July 24 as machine tailers; and Laurence Klein, hired on August 22 as an operator of machines on which Harrington was experienced. Harrington was as qualified as the new employees to do the work for which they were hired. It is not without significance that Knaus himself had testified that when Harrington applied for reemployment on or about July 9, 1935, the respondent could "use him."

Rudolph Lechner

Since Lechner had been discharged on July 15, 1935, the question of availability of a position for his reinstatement is not material to the inquiry.

In addition to the positions already enumerated which were available to the employees discharged, there were a number of vacancies in the yard and kiln departments and one in the shipping department, which all of the employees involved, with the exception of Harrington and the possible exception of John Brooks, were capable of filling.

The respondent's defense, as articulated in Knaus' testimony, on the issue of availability of positions for the employees discharged before the enactment of the Act is twofold. First, some of the new employees were hired in pursuance of the respondent's policy to give preference to youth and vitality; and second, others were hired in preference to the employees discharged because they possessed peculiar qualifications and expertness in their respective lines.

We shall make an analysis of the evidence on the basis of Knaus' testimony, comparing the qualifications of the new men hired by the respondent and those of the men discharged. This testimony was received subject to the objection of counsel for the Board to its admission, on the ground that it was not within the purview of the court order remanding the case for further hearing. In so far as the testimony concerned the competency of the old employees to do the work done by them prior to their discharge, it was clearly not within the purview of the court order. However, that part of the testimony which was intended to establish that the new employees were hired to do work which could not have been done by the old employees is relevant to the issue of the supplemental hearing. We will, therefore, admit that part of Knaus' testimony and reverse to that extent the Trial Examiner's ruling to disregard the testimony of Knaus.

As to the first ground for giving preference to the new employees, it is apparent that the alleged policy could not be the real reason for failure to rehire the employees discharged. Although only three of these employees were over 50, many of the employees who are now doing the work previously done by the discharged employees are over 50. Tailing machines, a vernacular term for helping in the operation of a machine, necessitates the possession of speed, agility, youth, and strength, according to Knaus. "It is where youth plays a part again, and quickness, because he slows up the operation if he isn't quick taking it away." Indeed, "Youth is the primary consideration." Older men, however, Knaus admitted, are employed at tailing machines. Indeed, one of the machine tailers now working for the respondent has reached the age of 80.

But even in hiring new employees, the policy of giving preference to youth is apparently not of uniform application. Thus, among the employees hired, Michael Graszler, employed as a trucker, was 56; Carl Heuvel, a carver, was 50; and Frank Brewster, a cabinet maker,

was 63 years old. The case of Hugh W. Jones is particularly illuminating. He was a "skilled carpenter" hired as a packer, a job which Knaus describes as needing the following requirements of strength, "A packer is a man—he has got to be robust, a man of robust and good physique so that he can lift one end of a hardwood casket along with another man, which weighs, at that point, in the neighborhood of two hundred to two hundred and fifty pounds and deposits it in a pine box or hardwood box." Jones was 55 years old. There is no evidence that Jones had any experience as a packer when he was hired by the respondent. It is also significant that all of the employees discharged were younger than Jones.

As to the second ground for giving preference to some of the new employees, that is their alleged peculiar qualifications and expertness, the objective evidence negates that as the actual reason for the respondent's failure to reemploy the discharged employees. The average wage rate in the plant is 50 cents an hour; that of the employees discharged, with the exception of John Brooks who was making 45 cents, was 67 to 73 cents an hour; while the new employees were hired at the rate of 35 to 40 cents an hour. These comparative earnings certainly do not support the claim to any great skill or peculiar qualification on the part of some of the new employees in comparison with the employees discharged. Knaus attempted to explain this inconsistency by claiming that the starting day rate was lower than the average hourly piece rate which applied to the employees discharged. However, Knaus failed to state what the average piece rate of the new employees was, if they had been put on a piece rate. Although the wage rate did not depend upon seniority, Knaus at first claimed that skill and speed or any other qualification did not determine what wage rate a worker would receive. However, he subsequently admitted that those receiving 80 cents an hour were of the highest skill.

At the oral argument before the Board, counsel for the respondent argued that some of the new employees hired by the respondent were employed as apprentices, for which positions the employees discharged could not apparently be reemployed. However, the record of the first or second hearing in the case is devoid of any indication that an apprentice system existed in the Oneida plant of the respondent.

The evidence indicates that the employees hired by the respondent did not possess qualifications of age, strength, or skill which induced the respondent to employ them in preference to the discharged employees to do work which was the same as or comparable to that done by the latter. The employees discharged were as qualified as the new employees mentioned to do the work for which the latter were hired by the respondent.

We therefore find that there were positions available in the Oneida plant of the respondent during or subsequent to the period of respondent's refusal to reinstate the employees involved in the complaint.

We are the less hesitant in reaching this conclusion because when the employees discharged had applied for reemployment they were refused reinstatement because of their union affiliation and activities. When an employer refuses employment to an applicant because of his union affiliation or activities, it is presumed that a vacancy existed which the applicant could fill. This presumption of course is rebuttable, but the burden of negating the existence of such vacancy is that of the employer.

That vacancies did exist which the employees discharged could fill is shown by the fact that new employees were hired by the respondent to do work which the employees discharged were at least equally capable of doing. It is reasonable to infer that these vacancies may have existed for some period prior to the time they were filled.

It may be, however, that when Knaus on or about August 19, 1935, refused to reemploy the employees discharged, there were no vacancies for all of them. However, the application for work was by its very nature a continuous one. Moreover, since Knaus refused to reinstate them because of their union affiliation and activities, it would have been futile for the employees discharged to make subsequent applications for work. Being futile, such applications could not be expected to be made. In the exercise of one's rights under the Act, as under any law, doing futile acts cannot serve as a requirement. We have repeatedly held that there is no need to make application for employment where the employer renders the making of such application futile. Thus, in *Matter of Mackay Radio & Telegraph Company*[4] where the employer induced four strikers to believe that they were blacklisted because of their union activities, we held that the application of the principle of "first come, first served" to those employees was a violation of Section 8 (3) of the Act. Likewise, in *Matter of Carlisle Lumber Company*,[5] where the employer conditioned reinstatement of the strikers on their renunciation of "any and all affiliation with any labor organization", we held that no application on the part of the strikers was necessary, declaring:

> To say that because they have not made application to go to work they were not refused employment would be to place a

[4] 1 N. L. R. B. 201, enforced in *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U. S. 333.

[5] 2 N. L. R. B. 248, enforced in *National Labor Relations Board* v. *Carlisle Lumber Company*, 94 F (2d) 138 (C. C. A. 9) 1937, certiorari denied, 304 U S. 575

> penalty upon them for not doing what they knew would have proved fruitless in the doing. The respondent's illegal conduct in publishing the aforesaid notice precluded all possibility of employment and relieved them of the necessity of making a formal application. Nor is it an answer to say that they were striking and would not have applied in any event. That was for them to decide. Furthermore, under the Act an employee cannot be required to renounce his union affiliation as a condition of employment.

Since in the instant case the employees discharged were lulled into a sense of futility by the respondent when vacancies occurred which the employees discharged could fill, it became incumbent upon the respondent to contact them for purpose of an offer of reemployment. There is no claim that an effort at such contact was made in this case. There is therefore no issue here whether a reasonable effort by a penitent employer may not be sufficient to fulfill this duty.

II. RULINGS ON MOTIONS AND EXCEPTIONS

Mention has already been made that Knaus' testimony will be admitted as part of the record. However, not much reliance can be placed by the respondent, in support of its position, on the failure of the employees discharged to testify at the second hearing to rebut Knaus' testimony concerning their competency to fill the vacancies. Their testimony at the second hearing concerning their competency would have been surplusage and a repetition of what they had testified at the first hearing. We have already found them to be capable of doing the work which they had done before their discharge. The tables of employment show that the respondent was hiring new employees to do work which was the same as or comparable to that performed formerly by the employees discharged. When Knaus testified that the new employees possessed peculiar qualifications for the vacancies which the old employees could fill, the discharged employees could not reasonably testify in rebuttal as to the qualifications possessed by the new employees. It was not a matter within their knowledge. But as we have seen, Knaus' testimony concerning the peculiar qualifications of the new employees collapses under the burden of its own contradictions and inherent improbabilities.

This brings us to a consideration of the respondent's exception to the observations of the Trial Examiner dealing with the issue of Knaus' credibility. The Trial Examiner stated in the Intermediate Report that Knaus was "argumentative and evasive"; that "his demeanor impressed the undersigned as that of a man intent upon scoring points with little regard for the truth"; that

"it is not possible to believe Knaus' testimony at its face value. He was anything but a straightforward witness"; and that he testified with a "tongue-in-the-cheek attitude." We do not consider such expressions as improper or indicative of hostility on the part of the Trial Examiner. Where the issue of a witness' credibility is involved, as in this case, the demeanor of the witness and his manner of testifying are pertinent to the inquiry. It was, therefore, within the province of the Trial Examiner, who has had opportunity of observing the demeanor of the witness, to make observations in his Report on the matter involved.

Aside from the ruling of the Trial Examiner excluding the testimony of Knaus concerning the new employees' qualifications, we affirm all his other rulings and deny the motions made by counsel for respondent at the oral argument before the Board.

The Remedy

We have found that the respondent has discriminatorily discharged Rudolph Lechner. In order to effectuate the purposes of the Act we shall order the respondent to reinstate him to his former or substantially equivalent position and make him whole for any loss of pay he has suffered by reason of his discharge by payment to him of a sum of money equal to the amount which he normally would have earned as wages from the date of his discharge to the date of reinstatement less his net earnings [6] during said period.

We have likewise found that the respondent has discriminatorily refused to reinstate the other discharged employees. In order to effectuate the purposes of the Act we shall likewise order the respondent to reinstate them to their former or substantially equivalent positions with back pay under the same terms as those mentioned in the case of Rudolph Lechner. However, their back pay is to begin to accrue from the date when the last employee was hired in each case to fill the vacancy.

Upon the basis of the foregoing supplemental findings of fact and the findings of fact contained in the original decision, the Board vacates the conclusions of law contained in said decision and, in their place, makes the following:

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[6] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company* and *United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590,* 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects are not considered as earnings, but, as provided below in the Order, shall be deducted from the sum due the employee, and the amount thereof shall be paid over to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects.

Conclusions of Law

1. Casket Makers Union 19559 is a labor organization, within the meaning of Section 2 (5) of the National Labor Relations Act.

2. The respondent, by discriminating in regard to the hire and tenure of employment of Rudolph Lechner, Anson Harrington, Clarence D. Snyder, George W. Brooks, Fred W. Corbin, John R. Brooks, and Leo F. Schmutz, and each of them, and thereby discouraging membership in the labor organization known as Casket Makers Union 19559, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

3. The respondent, by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, has engaged in and is engaging in unfair labor practices, within the meaning Section 8 (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATION

Upon the basis of the foregoing supplemental findings of fact, and the findings of fact contained in the original decision, and the foregoing conclusions of law, and pursuant to Section 10 (e) of the National Labor Relations Act, the National Labor Relations Board hereby recommends to the United States Circuit Court of Appeals for the Second Circuit that the Order of the Board issued by the Board on June 20, 1936, be modified to read as follows, and as so modified be enforced.

The National Labor Relations Board hereby orders that the respondent, National Casket Company, Inc., and its officers, agents, successors, and assigns shall:

1. Cease and desist:

(a) From discouraging membership in Casket Makers Union 19559 or any other labor organization of its employees by discrimination in regard to hire or tenure of employment or any term or condition of employment;

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

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Rudolph Lechner, Anson Harrington, Clarence D. Snyder, George W. Brooks, Fred W. Corbin, John R. Brooks, and Leo F. Schmutz, and each of them, immediate and full reinstatement, respectively, to their former or substantially equivalent positions without prejudice to the rights and privileges previously enjoyed;

(b) Make whole said Rudolph Lechner for any loss of pay he had suffered by reason of the severance of his employment by payment to him of a sum of money equal to that which he would normally have earned as wages during the period from the date of the severance of his employment to the date of such offer of reinstatement, computed at the wage rate he was paid at the time of such severance, less his net earnings [7] during said period; deducting, however, from the amount otherwise due to each such employee, monies received by him during said period for work performed upon Federal, State, county, municipal, or other work-relief projects, and pay over the amount, so deducted, to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects;

(c) Make whole the said Anson Harrington for any loss of pay he had suffered by reason of the failure of the respondent to reinstate him on July 9, 1935, or thereafter, by payment to him of a sum of money equal to that which he would normally have earned as wages during the period from August 22, 1935, when the last person was hired to do work formerly done by him to the date of such offer of reinstatement, compensated at the wage rate he was paid at the time he was discharged from employment by the respondent, less his net earnings; [7] deducting, however, from the amount otherwise due to each such employee, monies received by him during said period for work performed upon Federal, State, county, municipal, or other work-relief projects, and pay over the amount, so deducted, to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects;

(d) Make whole said Clarence D. Snyder, George W. Brooks, Fred W. Corbin, John R. Brooks, and Leo F. Schmutz, and each of them, for any losses of pay they have suffered by reason of the refusal of the respondent to reinstate them on August 19, 1935, or thereafter, by payment to each of them, respectively, of a sum of money equal to that which each would normally have earned as wages during the period from October 7, 1935, October 7, 1935, January 20, 1936, January 29, 1936, and October 7, 1935, respectively, the dates on which the last persons were hired to do the work formerly done by each of them, respectively, to the date of such offer of reinstatement, com-

[7] See footnote 6, *supra*.

puted at the wage rate each was paid at the time each was discharged from employment by the respondent, less their net earnings; [8] deducting, however, from the amount otherwise due to each such employee, monies received by him during said period for work performed upon Federal, State, county, municipal, or other work-relief projects, and pay over the amount, so deducted, to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects;

(e) Post notices immediately in conspicuous places in the Oneida plant, stating (1) that it will cease and desist and take affirmative action as aforesaid; and (2) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting;

(f) Notify the Regional Director for the Third Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

MR. DONALD WAKEFIELD SMITH took no part in the consideration of the above Supplemental Findings of Fact, Conclusions of Law, and Recommendation.

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[8] See footnote 6, *supra*