

**In the Matter of D-N-X ENGINE CORPORATION and UNITED AUTO-
MOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, C. I. O.**

Case No. 3-C-673.—Decided July 28, 1944

**DECISION
AND
ORDER**

Upon a complaint issued pursuant to charges filed by United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, herein called the Union, against D-N-X Engine Corporation, Buffalo, New York, herein called the respondent, a hearing was held before a Trial Examiner in Buffalo, New York, from December 29, 1943, to January 4, 1944, in which the Board and the respondent participated by their representatives. The Board has reviewed the Trial Examiner's rulings on motions and on objections to the admission of evidence and finds that no prejudicial error was committed. The rulings are hereby affirmed. On March 9, 1944, the Trial Examiner issued his Intermediate Report, a copy of which is attached hereto, in which he found that the respondent had not engaged in the unfair labor practices alleged in the complaint. Thereafter, the Union and counsel for the Board filed exceptions to the Intermediate Report, counsel for the Board filed a brief in support of his exceptions, and the respondent filed a reply brief.

The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner. While the circumstances surrounding the transfers and discharges of the employees involved herein, particularly the discharge of Cisló, are suspicious, we feel constrained to agree with the Trial Examiner that the record falls short of establishing that such transfers and discharges were discriminatory.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations
57 N. L. R. B., No. 125.

Board hereby orders that the complaint herein against D-N-X Engine Corporation, Buffalo, New York, be, and it hereby is, dismissed.

INTERMEDIATE REPORT

Mr. Milton A. Nixon, for the Board.

Mr. D. W. Raley, of Canton, Ohio, for the respondent.

STATEMENT OF THE CASE

Upon an amended charge duly filed on November 26, 1943, by United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Third Region (Buffalo, New York), issued its complaint, dated November 26, 1943 against D-N-X Engine Corporation, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices 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.

With respect to the alleged unfair labor practices the complaint as amended at the hearing¹ in substance states that the respondent: (1) discriminated against five named persons,² in regard to the hire, tenure, terms, and conditions of their employment, thereby discouraging membership in the Union; (2) through certain [named³] officers, agents, and servants, on or about July 19, 1943, and thereafter, (a) caused or permitted the issuance of warnings, reprimands, and threats to its employees because of their concerted activities, and (b) caused and permitted its foremen, supervisory employees, and guards to engage in constant surveillance over its employees because of their concerted activities; and (3) by the foregoing acts has discouraged membership in the Union and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act. The respondent in its amended answer dated December 30, 1943, admits certain facts concerning commerce but denies that it has engaged in any unfair labor practices.

Pursuant to notice a hearing was held at Buffalo, New York, on December 29, 30, and 31, 1943, and January 1, 3, and 4, 1944, before the undersigned Trial Examiner, James C. Batten, duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and participated in the hearing. All parties were afforded full opportunity to be heard, to examine, and cross-examine witnesses, and to introduce evidence bearing on the issues.

At the opening of the hearing, the undersigned denied the motions of the respondent to strike and withdraw from the consideration of the Board the amended complaint and in the alternative certain portions thereof. At the close of the Board's direct testimony, the undersigned reserved decision upon its motion to conform the pleadings to the proof and requested that the motion be renewed at the close of the hearing. Also, at this time, the respondent moved to dismiss the amended complaint and in the event that this motion was denied,

¹ At the opening of the hearing the undersigned, without objection, granted the Board's motion to amend its complaint and thereafter granted the motion of the respondent for leave to file an amended answer.

² The details of the respondent's alleged discriminatory treatment of the five named persons are set forth in Section III C hereof.

³ At the commencement of the hearing Board's counsel at the request of the undersigned, furnished to the respondent the names of these officers, agents and servants.

that certain paragraphs thereof be dismissed. The undersigned denied the motions. At the close of the hearing, the undersigned reserved decision upon the respondent's renewal of these motions. The motions are hereinafter disposed of by the undersigned's recommendation that the complaint be dismissed. Also at the close of the hearing the undersigned, without objection, granted the Board's motion to conform the pleadings to the proof as to minor details.

The Board and the respondent participated in oral argument at the conclusion of the taking of testimony. Briefs were filed by the Board and the respondent.

From the entire record thus made and from the undersigned's observation of the witnesses, the undersigned makes in addition to the above the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

D-N-X Engine Corporation is an Ohio corporation, with its plant located in Buffalo, New York, where it is engaged exclusively in the manufacture of Diesel engines for the United States Navy. Raw materials to the value of approximately \$135,948.47 were purchased during the period April 15, to November 30, 1943, of which approximately 100 percent represents shipments to the respondent's Buffalo plant from points without the State of New York. The sale of manufactured products during the same period amounted in value to approximately \$3,424,330.70, of which approximately 42 percent represents shipments to points outside the State of New York.

For the purpose of this proceeding the respondent admits that it is engaged in interstate commerce within the meaning of Section 2 (6) of the Act.⁴

II. THE ORGANIZATION INVOLVED

United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introductory statement*

The respondent was licensed to do business in the State of New York on April 25, 1942. It was formed for the purpose of manufacturing Diesel engines for the United States Navy. The Navy Department has supplied the plant equipment with which to do the work and the funds with which to operate the business. The respondent is not engaged in a commercial business, but acts in the capacity of a manager for the Navy Department, under the terms of a "restricted contract." Under its contract with the Navy Department, the respondent must manufacture engines solely for the Navy Department. The contract also provides for the building of engines of the "landing craft" type. This type of work has for several months carried an "over-riding" priority.

The plant in Buffalo, New York, occupies 406,000 square feet of floor space, this being a substantial part of the former Ford Motor Company plant. The respondent and the Navy are joint lessees and under the terms of the lease they are required to protect and maintain the entire property. The respondent took possession of the property on or about May 1, 1942, and the production of engines started in April 1943.

⁴ The findings in this section are based upon a stipulation of counsel.

The normal operations of the respondent's plant required the recruiting of a working force—foremen, production and maintenance employees, and guards—of approximately 300 employees. On April 4, 1943, when production started, the respondent had 97 employees and not until August was the required complement of employees secured. The increase of the number of women employees from 14, for the week ending July 5, to 64 for the week ending August 12, was an important factor in meeting the manpower requirements of the plant. Buffalo, for some time prior to the commencement of production in the respondent's plant, had been a critical manpower area, with a shortage of skilled employees, even before the respondent started operations. Under such conditions it became necessary for the respondent to recruit a working force from those who were either employed in non-essential industries or had never before been employed as industrial workers. In addition to the difficulty of obtaining employees, was the equally important problem of training that personnel and establishing a co-ordinated organization, while at the same time operating as a going concern.

In this instance there is no history of collective bargaining by the parties or concerted activity on the part of the employees, before the events at issue in these proceedings, and consequently no background evidence to support either the Board's allegations of unfair labor practices or the respondent's denial thereof. The first indication of the employees' interest in concerted activities occurred on or about the first week in July 1943, when the employees in the snagging (grinding) department became dissatisfied with their rate of pay and the lack of a proper blower system to remove the dust, caused by the grinding operations. At the request of Friend, foreman of that department, Personnel Manager Malone assembled the employees of the snagging department and told them that the respondent was paying more than the prevailing rate for that type of work and that the respondent had ordered the necessary equipment to remove the dust from the department. On Monday, July 19, the Union, with the assistance of several of the respondent's employees started a membership campaign among the employees in the plant. On October 12, 1943, the Board, after an election, certified the Union as the representative of the respondent's employees for the purposes of collective bargaining. Subsequent to the certification the respondent and the Union have had several bargaining conferences. The record does not disclose the progress which has been made on these negotiations.

B. The alleged discriminatory transfers and discharges; other alleged acts of interference, restraint, and coercion

1. The issues; contentions of parties

The amended complaint alleges that the respondent, in the operation of its plant in Buffalo, New York, discriminated against certain of its employees, through transfer and discharge, when it: (a) on July 20 terminated the employment of Leonard Cislo; (b) on July 23, 1943, transferred Albert Nappo and thereafter on July 27, terminated his employment; (c) on October 30, 1943, terminated the employment of Daniel Maulucci; (d) on October 26, 1943, transferred Lillian Ortel and thereafter on November 20, terminated her employment and (e) on October 12, 1943, terminated the employment of William Friend, a foreman, for the reason that he refused to participate in a pattern of anti-union activities carried on by the respondent. The amended complaint also alleges that the respondent has issued warnings, reprimands, and threats to its employees and maintained constant surveillance over them, because of their union activities.

The Board contends that the respondent, from on or about July 1, 1943,⁵ when the snagging department employees concertedly made demands for wage adjustments and improved working conditions, engaged in a pattern of anti-union activity through surveillance of the employees and interference with their rights to self-organization, particularly in the snagging department, where the Union activities originated. As a part of this pattern, the Board contends, the discharges of five named employees between July 20 and November 28, including a foreman who refused to assist the respondent in carrying out its pattern, were all designed to interfere with the employees' rights to self-organization and collective bargaining. The respondent asserts that there was no plan or pattern to interfere with the union activity of its employees or their efforts to promote self-organization. Further the respondent asserts that this is evident from its indifferent attitude toward the Union's activities and from the transfer and discharge of certain employees for reasons wholly unrelated to their concerted or Union efforts.

2. The alleged discriminatory transfers and discharges

The cases of the employees alleged to have received discriminatory treatment from the respondent will be considered by taking up those of the non-supervisory employees in the following order: Leonard Cislo, Albert Nappo, Daniel Maulucci and Lillian Ortel, and then the discharge of William Friend, although his termination of employment preceded that of Daniel Maulucci. Before so proceeding however, the undersigned will consider certain evidence which, although general in character, has a bearing upon the disposition of the issues and contentions set forth above.

The respondent in the establishment of a new plant of the type here involved was in the peculiar position of attempting to organize and produce at the same time. There were no definite rules of conduct for the control and discipline of the employees, making it necessary from time to time to change rules and establish new ones as production progressed. There is no evidence to indicate that the treatment accorded the respondent's employees, before and after the organizational efforts of the Union, was different in any respect. It is clear from the record that since the start of productive operations in April to the time of the hearing herein, the respondent was presented with problems such as employees roaming about the plant, undue loafing in the wash rooms and irregular attendance, which retarded materially the production of Diesel engines. This condition existed before and after the employees evidenced any interest in concerted or union activities and justified the respondent in using reasonable and non-discriminatory methods to control these irresponsible practices on the part of the employees. However, there is no evidence to show that any steps taken by the respondent to correct this situation were either in the first instance designed to deny to the employees their right to self organization, or thereafter were discriminatorily applied. There is no credible evidence in the record of any supervisory employee, foreman or representative of the management questioning the employees concerning their union membership or their activities, or warning them in any way that such activities might result in adverse action by the respondent. There is totally lacking any background upon which to base a finding of a design to thwart the desire of the employees. On the contrary, employees were hired without regard to their previous union affilia-

⁵ The events and incidents hereinafter referred to occurred in 1943; unless otherwise indicated.

tion, in some instances with knowledge on the part of the respondent that they had been active in the Union here involved.

It is contended by counsel for the Board that the respondent issued warnings, reprimands and threats to its employees and maintained constant surveillance over them, and thereby violated Section 8 (1) of the Act. The record is barren of any facts to support this contention. The testimony offered to support this contention was directed principally to the activities of the plant protective force. The plant protective force at all times material herein was not increased, nor were the assignments or stations of the guards in any way changed. Furthermore it is undisputed that at no time were the guards given any instructions by any representative of the management that they were to spy upon or in any way interest themselves in the concerted or Union activities of the employees. The guards were at all times in uniform and were known to be a part of the plant protective force wherever they might appear in the plant. The only incident testified to by the Board's witnesses to support an allegation of surveillance was when a new guard stood in the doorway leading into the snagging department for a short period of time. When this was called to the attention of the sergeant then on duty, he immediately instructed the guard that it was not proper to stand in any one place in the plant but to walk his station regularly. There is some further testimony that on a few occasions guards have cautioned employees about spending too much time in the wash room or loitering in parts of the plant where their duties did not require them to be. It is clear, however, that none of these activities were in any way connected with the organizational activities of the employees. Furthermore the guards made no reports to the respondent even in those instances where they cautioned or warned employees about roaming or loitering in the plant. There is no evidence in the record to support an independent 8 (1) allegation that the respondent issued warnings, reprimands and threats to its employees unless it is the testimony of Albert Nappo, one of the alleged discriminatory dischargees, when he testified that both the superintendent of the maintenance department and a set-up man in that department advised him that Union activities in the maintenance department were taboo. For reasons later discussed in connection with the discharge of Nappo, the undersigned does not credit his testimony with respect to these warnings. The undersigned is particularly impressed by the fact that the testimony concerning these incidents is the only evidence offered by the Board of any statements by the respondent's representatives that might be construed as interference with the rights of the employees to self-organization.

The sequence of events and the methods used by the respondent to improve production in the plant have none of the usual earmarks of anti-union activity. On the other hand, the evidence clearly establishes that the respondent's course of conduct after the advent of the Union was not designed or calculated to circumvent the Act by discouraging organizational activities in any way.

It is the opinion of the undersigned that the evidence fails to support the Board's contention that the respondent engaged in a pattern of anti-union activities designed for the purpose of denying to its employees their rights under the Act. Further, the undersigned is convinced that a consideration of the circumstances surrounding the unrelated and non-discriminatory transfer and discharge of the above named employees, the details of which are hereinafter related, furnishes additional proof that the respondent did not follow a pattern designed to deny to its employees the benefits of the Act.

3. The alleged discriminatory discharge of Leonard Cislo

Cislo was employed by the respondent on June 7, 1943, and from then until July 20, served as an inspector in the receiving department. Cislo, prior to his employment with the respondent, had worked for several years in the Buffalo plant of the Ford Motor Company, a part of which time Malone, the respondent's personnel manager was employed by that Company as its personnel manager. When Malone hired Cislo for employment in the respondent's plant, he was aware of the fact that he had been an active member of the Union Cislo, while working for the respondent, retained his membership in his local. He was an efficient and competent employee.

The respondent contends that Cislo was discharged for the falsification of his employment application. The facts as testified to by Personnel Manager Malone and Superintendent Foss are not in dispute and are here briefly summarized: The form and content of the employment application form used by the respondent was prepared in accordance with requirements of the Second Service Command of the Army. The form contained a question "Have you ever been arrested for other than traffic violations?" Sometime prior to the time Cislo started work in the respondent's plant he filed with its employment office the required application form, but when he reported for work on June 7, the form had been misplaced and he then filed another form. In both instances Cislo's answer to the question, "Have you ever been arrested for other than traffic violations," was in the negative.

The respondent was required by the Second Service Command to investigate all applicants for employment, but in many instances the investigations were not completed until after the applicant had been employed. In the case of Cislo it was not until about July 19 that Malone became aware of the fact that Cislo had several years prior to his employment with the respondent been found guilty of petty larceny in a juvenile court proceeding. This being the first instance that had come to the attention of the respondent, where an applicant had falsified an application for employment, Malone phoned the office of the Second Service Command and discussed the problem with that office. Malone was advised by that office that falsification of an employment application had been the basis for discharge in other plants in that area, but that it was a problem to be disposed of by the respondent. Malone then talked with Superintendent Foss concerning what if any action should be taken with respect to Cislo and they decided that his employment should be terminated.

On July 20, Cislo, when he was called in the office, in the presence of Malone and Foss, admitted that his answers on the applications were not true and that he had been arrested for other than a traffic violation. During the conversation Cislo asked that the incorrect employment application forms be destroyed and that he be permitted to make out another one reflecting the true facts. Malone refused this request of Cislo. Cislo was then discharged and received a check for his wages.⁶

The following morning, July 21, Miller, an International Representative of the C. I. O. phoned Malone and inquired about the discharge of Cislo. Malone refused to consider Miller's request that Cislo be reinstated. In the course of the conversation Malone told Miller that Cislo had been discharged because of falsification of an employment application. Miller then suggested that the application on file be torn up and Cislo be permitted to make out a new one. Malone replied that this could not be done. Miller, during this conversation, told Malone,

⁶ The respondent's "Pay Off Slip" dated July 20, and signed by Foss, discloses that Cislo was discharged because of "misrepresentation on application."

"You know that we are putting on an organizational drive at your plant." This was the first knowledge which Malone had that any union was organizing in the plant.

The undersigned now turns to a consideration of the Board's contention that Cislo was discharged because of his Union activities. Cislo testified that he was not active in the organizational campaign of the Union which started a few days before his discharge, on July 20. He did, however, at the request of Maulucci, an employee in the snagging department, take a number of Union application cards and within two days, obtained the signatures of approximately 30 employees. Cislo further testified that his foreman, Kehr, knew a union card when he saw one, but that he (Cislo) could not say that Kehr saw the cards either in his pocket or on his work bench or observed him passing out the cards to the employees. He also testified that up to the time of his discharge he did not wear a union button nor did he participate in any union activities during working hours.

While the discharge of Cislo, an employee with a good work record, for the falsification of his employment records, in the opinion of the undersigned seems to be, under these circumstances, a rather harsh method of punishment, the choice of the punishment is a prerogative of the respondent and such harsh treatment does not establish that the discharge was induced by a discriminatory motive.

The evidence is clear that Cislo falsified his employment application in a matter that to the respondent appeared to be important. Moreover, Cislo was known to be a Union member when he was employed by the respondent and his Union activities do not appear to have been so conspicuous as to justify an inference that respondent had knowledge of such activities.

From the foregoing, it is found that Cislo was discharged for cause as a result of the falsification of his employment application and that his membership in or activities on behalf of the Union had no relation to or in any manner affected his discharge.

4. The alleged discriminatory transfer and discharge of Albert Nappo

Nappo was employed by the respondent on April 22, and worked in the snagging department as a grinder until July 22, when he was transferred to the maintenance department. Prior to his employment with the respondent Nappo drove a taxi in Buffalo and he continued to do so after starting work for the respondent, several evenings each week, especially during the week ends. On July 28, after an absence of 2 days, Nappo, was discharged. With respect to Nappo two issues are presented; whether or not his transfer on July 22 and thereafter his discharge on July 28, were induced by his Union activities, or by reasons unrelated thereto.

The testimony of Nappo as to his Union activities, if credited, provides a foundation which possibly would support an inference that the respondent in transferring and thereafter discharging him was motivated by such reasons. The undersigned, however, cannot give any credence to Nappo's testimony. It was contradictory and in most respects unsupported by the testimony of his fellow employees.⁷ It is unnecessary here to particularize the testimony of

⁷ The facts stated herein concerning the transfer and discharge of Nappo are based principally upon the credible testimony of Malone and Hartwig, maintenance superintendent. The undersigned is unimpressed by the testimony of Nappo or that of his father Joseph Nappo. Appraising their testimony in the light of contradictions and implausibilities found throughout especially in their recital of alleged notices given the respondent, during Nappo's absences, the undersigned is fully persuaded of its untrustworthy character. There is substantially more confusion as to details in their testimony than is common in the stories of trustworthy and reliable witnesses. Nappo, when filling out an application for employment with the respondent, answered in the negative to a question "Have you ever been arrested for other than a traffic regulation." The information that Nappo had

Nappo, because assuming *arguendo* that the respondent knew that he was, in the early part of July, a leader in the concerted activities in the snagging department and later active in the organization of the Union, the fact remains that he initiated the transfer and then created the situation which resulted in his discharge.

At the time Malone spoke to the employees of the snagging department in the early part of July, Nappo requested Malone to transfer him to the green assembly department. Malone replied that if an opportunity presented itself the transfer would be considered. In the meantime, the respondent was making an analysis of the operations in the plant for the purpose of replacing as many men as possible with women workers and had determined that certain of the work being done in the snagging department could be done by women. Nappo was working in that department on a light job that could be readily performed by a woman. Shortly prior to July 21, Malone had a request from Hartwig, maintenance superintendent, for some additional help in the maintenance department. Malone advised Hartwig that Nappo, an employee in the snagging department, had requested a transfer and that on the following day, July 21, Nappo would be transferred to the maintenance department.⁸ July 21, Nappo did not report for work and, in accordance with respondent's usual custom in the case of absence, Nappo's time card was removed from the time rack. On the morning of July 22, when Nappo reported for work and found that his time card was out, he reported to Malone. Malone inquired of Nappo why he had taken off the day before. Nappo replied, "I had business to take care of." Malone then pointed out to Nappo that it was most essential that he notify the respondent when it was necessary to absent himself from the plant. Nappo agreed that in the future he would do so. Malone then transferred Nappo to the maintenance department as a millwright helper.

Nappo worked on Thursday, Friday and Saturday, July 22, 23, and 24, and was absent again on July 26 and 27. Again Nappo's time card was pulled and sent to Malone's office. When Nappo did not report for duty Monday morning, July 26, he was classified as an absentee and Hartwig the maintenance superintendent, checked with Malone's office to determine whether Nappo would be in that day. Malone advised Hartwig that he had not had a report concerning Nappo's absence. On Tuesday morning, July 27, Nappo not having reported the reason for his absence, Hartwig told Malone that he did not want Nappo in his department and that the respondent would have to get some one in Nappo's place because of the amount of emergency work that had to be done in the department. Hartwig at that time also told Malone that Nappo had refused to work over time. This was a rather serious situation because much of the millwright work had to be done after production shut down at the end of the day. Late Tuesday afternoon, July 27, Nappo called Malone on the phone. In

served two terms in the Erie County Penitentiary for larceny did not come to the attention of the respondent until after Nappo's discharge. This evidence was offered by the respondent to show that Nappo, under any circumstances, should not be reinstated. The undersigned has given consideration to this incident in the determination of Nappo's credibility. Their testimony is rejected in its entirety.

⁸ Counsel for the Board offered a substantial amount of testimony to indicate that Nappo's transfer to the maintenance department was to a less desirable job than the work which Nappo had done in the snagging department. Nappo had on several occasions complained about the undesirability of working in the snagging department because of the dust and dirt, and his transfer to the maintenance department was a much more desirable job from the standpoint of wages, working conditions and future possibilities for increased wages. Also, the evidence is clear that not only was Nappo's former job in the snagging department taken by a woman, but several other light grinding jobs in that department were taken by women employees.

the course of the conversation Malone inquired of Nappo why he had been absent for 2 days. Nappo replied that he had taken 2 days off to attend to some business but would report into the plant the following morning. Malone then told Nappo that when he reported to the plant his check would be ready for him. The following morning when Nappo reported to Malone, Malone advised him that he was discharged and to get a clearance from the tool crib, return to the employment office and get his check. Nappo requested a release which was furnished to him by Malone. On July 27, the day prior to Nappo's return to the plant, General Superintendent, Foss made out a "Pay Off Slip," stating that Nappo had been discharged for the reason "irregular worker—drives taxicab nights. Unable to hold down both jobs."

The respondent from the time production started in the plant in April down to the time of the hearing has been confronted by a serious problem of absenteeism. During the period from July 5 to October 25 approximately 26 employees had been discharged as "irregular workers" and an additional 7 for loitering or roaming in the plant. Further, the record of absentees from the period of July 5 to October 25 discloses that an average of approximately 20 production and maintenance employees were absent each day. Such a record of absenteeism in a plant engaged exclusively in the manufacture of Diesel engines for landing crafts is inexcusable and warranted the respondent in taking such steps as in its judgment were necessary to correct the situation.

The evidence fails to show that Nappo's concerted or Union activities induced his discharge. The entire record herein convinces the undersigned that Nappo's transfer and discharge were not discriminatory. The undersigned concludes and finds that the respondent's transfer and discharge of Nappo was not motivated by his concerted activities, his membership in or activities on behalf of the Union.

5. The alleged discriminatory discharge of Daniel Maulucci

Maulucci started working at the respondent's Buffalo plant on June 7 and was discharged on October 30. During this period he served as a grinder in the snagging department. Maulucci was active in the Union and after the certification of the Union by the Board on October 12 he was chairman of the negotiating committee. According to the "Pay Off Slip" issued on November 3 he was discharged for "soliciting Union dues during working hours."

In addition to the immediate reason for Maulucci's discharge "soliciting union dues during working hours" there is a substantial amount of testimony in the record concerning his absences from the snagging department and his loitering in various parts of the plant. That the respondent was confronted with a situation of a serious nature because of the employees loitering in various parts of the plant is conceded. It is, however, unnecessary here to either detail or review the testimony given by Maulucci and Malone concerning Maulucci's loitering around the plant and the amount of time he spent away from the snagging department. The evidence is clear that Maulucci and another employee, Salvasao, were perhaps the worst violators in respect to absenting themselves from their department, but the respondent does not contend that Maulucci was discharged for that reason, although it undoubtedly to some extent influenced Malone at the time of the discharge.

The respondent did not have an established or posted rule against Union solicitation within the plant; however, the evidence is ample to support the conclusion that Maulucci and all of the other employees who were active in supporting the Union were well aware of the fact that such activities should not be carried on within the plant during working hours. Maulucci had been

warned by Malone on at least one occasion prior to his discharge on October 30 that he, Maulucci, should not spend his time during working hours on the business of the Union.⁹

On October 30, the day of Maulucci's discharge, Beechan, a guard, on making his regular round through the plant, from a distance of about 200 feet observed two men standing near a stack of empty crates in a part of the plant not occupied by the respondent's operations. Beechan proceeded toward the two men and when he was close enough to notice that it was Maulucci and another employee, Gable, the two employees walked away and entered the door leading into the snagging department. Beechan then proceeded on his rounds and when returning, as he passed the door of the snagging department, looked in as was his custom and noticed Maulucci and Gable engaged in a conversation at Maulucci's bench.¹⁰ Beechan then proceeded into the snagging department and approached Maulucci and Gable, observing that Maulucci was writing something on a piece of paper. Beechan approached Maulucci and inquired what he was doing. Maulucci replied that he was writing a receipt for Union dues that he had received from Gable. Beechan then took Maulucci and Gable to the office of Malone, the employment manager. Beechan asked Malone what should be done about an employee who collected Union dues during working hours. Beechan also advised Malone that Maulucci had been writing out the Union receipt at his bench and that the receipt was in Maulucci's pocket. After Maulucci admitted that he had been writing out the receipt, Malone told him that he had been previously warned about carrying on Union activities in the plant and that "you know better than this." Maulucci replied, "So what?" Maulucci further stated to Malone that he had been following such practice in the plant for a long time and turning to Beechan, the guard, Maulucci said, "it took you a long time to catch up with me." Malone then ordered the guard to take Maulucci down to the tool crib and get a clearance slip. After the departure of Maulucci and the guard, Malone called Foss, the general superintendent, and explained what had happened. Malone recommended to Foss that Maulucci be discharged. Foss concurred in this recommendation and Malone then ordered that Maulucci's time be figured up and he then received a check for the amount of wages due him.

The actual occasion for Maulucci's discharge was his violation of Malone's special warning not to engage in Union activities on company time and his insolence to Malone when this was called to his attention. While the respondent did not attempt to justify the discharge on the basis of Maulucci's general disregard of his work in loitering and roaming throughout the plant, such conduct served to aggravate the situation when the collection of Union dues was brought to Malone's attention. The sum of these circumstances constitutes ample and just cause for the discharge.

The undersigned concludes and finds that Maulucci's membership in and activities in behalf of the Union in no way motivated the respondent in his discharge.

6. The alleged discriminatory transfer and discharge of Lillian Ortel

Mrs. Ortel was employed by the respondent on September 17 and was assigned to the shipping department. After about 5 days her leg was injured while un-

⁹ Maulucci denied that Malone had ever warned him about his Union activities during working hours, but admitted that he may have approached some of the women in the parts department on Union business. The undersigned credits the testimony of Malone that on at least one occasion prior to Maulucci's discharge he had been warned to cease Union activities in the plant.

¹⁰ Gable did not work near Maulucci's bench and it was obvious to Beechan that Gable was not engaged in any work required by the respondent.

crating a motor. Mrs. Ortel, upon recommendation of the respondent's doctor, was transferred to the packing department in order that she could sit while working. On October 24 the packing department, due to a shortage of parts, was unable to keep the employees in that department busy. Under usual circumstances Mrs. Ortel would then have been transferred back to her regular job in the shipping department, but that department also was practically closed down due to instructions from the Navy Department to cease the shipment of Diesel engines. At that time there was a demand for additional employees in the snagging department, it being a department where a number of women had recently been transferred to grind light motor parts in order that the men employees could be released for heavy duties in other parts of the plant. On October 24 Mrs. Ortel was transferred to the snagging department and assigned to work that she was capable of doing. Mrs. Ortel protested her transfer to the snagging department and demanded to see Malone. She advised Malone that the work was too heavy in that department and also that it was rather dirty, and for these reasons she did not care to be transferred to the snagging department. Malone prevailed upon Mrs. Ortel to accept the transfer and try out the work. She decided to do so and continued in that department until her discharge on November 24 although during the period from October 24 to November 24 she worked only intermittently and not at all after November 9.

Mrs. Ortel joined the Union a few days after she started to work in the shipping department. She was not active in the Union and according to her testimony did not solicit memberships, and at no time had any membership or application cards in her possession to pass out to the employees. The only incident which occurred during the time Mrs. Ortel was employed in the respondent's plant that might provide a basis for an inference that the Union was in any way connected with either her transfer or discharge occurred shortly after October 12, the date upon which the Board certified the Union as the representative of the respondent's production and maintenance employees. Mrs. Ortel was instructed by her foreman to report to the office of Malone. When she reported to that office Malone told her that he had received complaints from at least three of the girls in the packing department that she was interfering with their work by talking a great deal about the Union. Malone went on to explain to Mrs. Ortel that she was employed by the respondent to do certain work and that she should not take up her time with Union activities or interfere with the work of the other employees. Malone at this time, further stated to Mrs. Ortel that it was immaterial to the respondent what activities she engaged in on behalf of the Union, if it was not done upon the respondent's time. Mrs. Ortel denied that she had interfered with the work of the girls by discussing the Union. Malone then instructed Mrs. Ortel to return to her department. The statement of Mrs. Ortel concerning this conversation varies somewhat from that of Malone; however, the variance is not in substance but in the choice of words. Whether the version of Malone or Mrs. Ortel is accepted, it is plain that Malone did nothing more than to tell her that she should not engage in Union activities during working hours or interfere with the work of other girls in the department. Mrs. Ortel testified that Malone closed the conversation by stating, "I will give you another chance." Aside from this incident there is no testimony in the record that Mrs. Ortel engaged in any further activities on behalf of the Union.

As hereinbefore related Mrs. Ortel was transferred to the snagging department on October 24. After working for about 6 days Mrs. Ortel remained at home for 4 days without reporting her absence to the respondent. Mrs. Ortel testified that she remained at home because of some trouble she had with her eyes caused by the dust in the grinding department. She further testified that she did not report the matter the respondent's nurse or doctor at the plant, nor

did she have any outside medical service. Mrs. Ortel reported back to the plant and worked for 2 or 3 days and was absent then from November 9 until she reported at the plant on November 24. The evidence indicates that on the morning of November 9, Mrs. Ortel's mother-in-law died and through Bob Rave, another employee with whom she rode to work, her foreman was advised that she would be absent for several days. Rave reported to Mrs. Ortel that Walter Root, her foreman, said that it would be all right. The funeral was held on November 11 and on November 12 there was a bad snow storm. Mrs. Ortel, as well as other employees who lived about 30 miles from the plant, could not get to work on that morning. Rave, in whose car Mrs. Ortel rode to work, attempted to go to the plant on that morning. While on the way to the plant his car was "ditched," but he was able to obtain a ride with another employee. Upon arriving at the plant Rave was taken seriously ill and sent to the hospital. When Mrs. Ortel learned that Rave was in a Buffalo hospital she phoned to Malone and told him that as soon as she found some one with whom she could ride she would report back to work. Mrs. Ortel was carried on the respondent's records in an absentee status until November 20 and then her time card was pulled from the rack and her employment terminated. On November 24, she reported at the plant, found her time card missing and went to see Malone about 7:00 a. m at the beginning of the morning shift. Malone advised Mrs. Ortel that her employment had been terminated as of November 20. On November 20, Foss, the General Superintendent, signed a "Pay-Off Slip" indicating that Mrs. Ortel was laid off for the reason that she was "absent from November 8."

Under the circumstances related above, and in view of the fact that Mrs. Ortel's Union activities were not conspicuous in any way, warranting an inference that her discharge was for that reason, the undersigned finds that Lillian Ortel was not discriminatorily transferred and thereafter discharged, and further that by discharging her the respondent has not engaged in an unfair labor practice within the meaning of Section 8 (3) of the Act.

7. The alleged discriminatory discharge of William Friend

Friend was employed on October 20, 1942, as an electrician's helper and after working in the maintenance department for about 4 months was placed in charge of 4 or 5 employees who did grinding work. Shortly thereafter the respondent decided to organize a snagging or grinding department and Friend was selected as the foreman. On October 9, 1943, he was discharged. During the time that Friend was employed in the maintenance department as a helper, his work was satisfactory and the respondent considered him to be a competent worker.

When the respondent started production in April 1943, Friend, then being in charge of the grinding work, had two or three employees. For some time after April it was not the intention of the respondent to do any great amount of grinding work in the plant, but after some negotiations with outside sub-contractors, the respondent decided that it could better do the grinding work and then organized the snagging department within its plant. After this decision was made the respondent continued Friend in charge of the work. Some time in June 1943 the grinding work was moved from near the maintenance department to one end of the plant. Friend organized the new department and continued as its foreman until October 9, 1943.

The Board contends that the respondent discharged Foreman Friend "because of his refusal to participate in a pattern of anti-union activity carried on by the respondent." Friend testified that no one representing the management ever spoke to him concerning the concerted or Union activities of the employees in the snagging department, or made any reference to the organizing efforts of the

Union He further testified that he did not, although he knew that the employees were active in organizing the Union, ever report to any one representing the management that the Union was active in the plant. On one occasion, Friend cautioned some of the employees in the snagging department that they should "watch their step," but he did not discuss this cautionary remark with any representative of the management. The Board does not assert that any representative of the management ever suggested to Friend to watch the employees and report upon their activities. The Board bases its contention concerning Friend's discharge upon the fact that Friend, in the early part of July, concurred in the request of the employees of the snagging department for an increase in wages and upon the further fact that on several occasions, Foss, the general superintendent, and Malone spoke to Friend about certain of his employees who were spending a great deal of time outside of the department. However, there is no testimony to indicate that these remarks by Foss and Malone had any reference to concerted or Union activities. There is no question but that loitering and roaming in the plant was a serious problem to the respondent. Furthermore, other foremen had received similar instructions from Foss and Malone. Foss, in the presence of Malone, also on several occasions told Friend to assert himself and that he should run his department, rather than have the employees run it for him. Foss and Malone also advised Friend, that they had no complaint about his work, but that as a foreman he was not employed to actually do the work but to supervise the employees and direct their activities.

If the respondent was engaging in a pattern of anti-union activities designed to interfere with the rights of the employees, Friend certainly would have received some suggestions or instructions intended to fit into the respondent's pattern. There is no such testimony in the record. The testimony is clear that Walter Root, who succeeded Friend as foreman of the snagging department, substantially increased the production in the department while decreasing the working force. The testimony of employee Salvasio discloses that after Friend was discharged there was a considerable improvement in the problem of loitering and roaming about the plant and that he, since the new foreman was appointed, has left the department only three or four times. There is no claim that Root in his actions or course of conduct, is in any way hostile or adverse to the Union.

When Friend was called into a conference with Foss and Malone and told that it appeared it was impossible for him to properly supervise the snagging department, and that on more than one occasion, he, Friend, had been told to discontinue actually performing the work in the department and organize it, Friend replied by suggesting that under those conditions the respondent had better "find some one else to take over his duties." When Friend made this statement Foss replied, "Well, we will replace you tomorrow morning." On October 9, Foss the general superintendent made out a "Pay-Off Slip," indicating that Friend had been discharged for the reason: "does not fit into organization in a supervisory capacity."¹¹

Upon the basis of the record and the foregoing the undersigned concludes and finds that William Friend was discharged as a foreman of the snagging department because of his inability to properly perform his supervisory functions.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

¹¹ Board's counsel in his brief makes a special point of the fact that Friend was not discharged until October 12, the date upon which the Board certified the Union as the bargaining representative of the employees. The date October 12 is clearly incorrect. The records of the respondent disclose that Friend was discharged on October 9.

CONCLUSIONS OF LAW

1. The operations of the respondent occur in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations is a labor organization within the meaning of Section 2 (5) of the Act.

3. The respondent has not discriminated against Albert Nappo, Leonard Cislo, Daniel Maulucci, Lillian Ortel and William Friend because of their Union membership or activities or because of their concerted activities for the purpose of collective bargaining or other mutual aid or protection, within the meaning of Section 8 (3) of the Act.

4. The respondent has not interfered with, restrained, or coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, within the meaning of Section 8 (1) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusion of law, the undersigned recommends that the complaint against D-N-X Engine Corporation, Buffalo, New York, be dismissed.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

JAMES C. BATTEN
Trial Examiner

Dated March 9, 1944.