

In the Matter of CLUB TROIKA, INC. and HOTEL AND RESTAURANT EMPLOYEES ALLIANCE, LOCAL 781, JACK ANIS, MICHELLE BERSENEFF, CONSTANTINE CHRESOHOIS, SAM DUBENOW, CHARLIE MARDER, PETER SHMYR, FRANK TAPARATA, SONYA TOUREY and EUGENE SOLGALA

*Case No. C-101.—Decided July 8, 1936*

*Hotel and Restaurant Business—Jurisdiction of Board in District of Columbia—Discrimination: discharge; lockout—Strike—Reinstatement Ordered: employees locked out; employees discharged—Back Pay: awarded; tips included as part of—Reinstatement Ordered, Strikers: strike provoked by employer's violation of law.*

*Mr. Jacob Blum* for the Board.

*Mr. Stanley S. Surrey*, of counsel to the Board.

## DECISION

### STATEMENT OF CASE

Upon charges duly filed by Hotel and Restaurant Employees Alliance, Local 781, hereinafter referred to as the Union, the National Labor Relations Board, by Bennet F. Schaffler, Regional Director for the Fifth Region, issued its complaint, dated April 18, 1936, against Club Troika, Inc., Washington, D. C., hereinafter called the respondent. The complaint and notice of hearing thereon were duly served upon the parties on April 23, 1936.<sup>1</sup> The complaint alleged that the respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1) and (3) and Section 2, subdivisions (6) and (7) of the National Labor Relations Act, approved July 5, 1935, hereinafter referred to as the Act, in that respondent had discharged and refused to reinstate Jack Anis, a waiter employed by it for the reason that he had joined and assisted the Union. The complaint further stated that following said discharge a number of respondent's employees had struck in protest and have not since been reinstated.

Pursuant to the notice of hearing, Emmett P. Delaney, Trial Examiner duly designated by the Board, conducted a hearing on May

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<sup>1</sup> A previous complaint had been issued on March 31, 1936, and a hearing noticed for April 13, 1936. Said hearing was postponed by the Regional Director and thereafter the complaint referred to in the text was issued.

4, 1936, in Washington, D. C. Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues was afforded to the parties. Respondent did not appear in person or by representative, nor did it file an answer to the complaint. After the hearing, an amended complaint was served upon the parties and thereafter, on June 30, 1936, a second amended complaint was likewise served. The second amended complaint, conforming the allegations to the proof adduced at the hearing, alleged that instead of voluntarily going on strike, all but one of the above-mentioned group of employees had been locked out and discharged because of their membership in the Union and that one of them, Eugene Solgala, had struck in protest against the discharges. The respondent did not answer the second amended complaint nor did it request an opportunity to be heard thereon.

On May 13, 1936, the Trial Examiner duly filed his intermediate report with the Regional Director, in which he found that Jack Anis had been discharged by the respondent on March 18, 1936, and that seven other employees<sup>2</sup> had been locked out on March 19, 1936. He recommended that all be reinstated with back pay. With the exception of a few modifications, we find that the evidence sustains his findings.

Upon the entire record, including the pleadings, the stenographic transcript of the hearing, the documentary and other evidence received at the hearing, and the intermediate report, the Board makes the following:

### FINDINGS OF FACT

#### I. THE RESPONDENT

1. The Club Troika, Inc. owns and operates at 1011 Connecticut Ave., Washington, D. C., a restaurant and night club at which it furnishes meals, drinks and entertainment to the general public. In its advertisements the place is referred to generally as the "Club Troika" or the "Russian Club Troika." There are about 50 tables in the club and it can accommodate about 200 persons. The gross receipts from drinks and meals average \$3,000 a week. The respondent employs approximately 50 persons at the club—cooks, waiters, doormen, entertainers, musicians, bartender, etc. The club is closed during the summer months, opening in October.

In view of the above operations, the respondent is engaged in trade and commerce within the District of Columbia.

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<sup>2</sup> Berseneff, Chresohos, Dubenow, Marder, Taparata, Tourey, and Solgala.

## II. THE UNION

2. The Hotel and Restaurant Employees Alliance, Local 781, is a labor organization affiliated with the American Federation of Labor. Persons working in restaurants and hotels are, with some exceptions, eligible for membership in the Union and it acts as a collective bargaining agency for such employees in Washington, D. C. At the time of the occurrences in this case, all of the respondent's waiters and waitresses were either members of the Union or applicants for membership.<sup>3</sup>

## III. THE UNFAIR LABOR PRACTICES

3. The waiters and waitresses of the respondent were supposed to be paid \$10.50 a week, the Union scale. However, the respondent withheld their weekly wages from them although it obtained a receipt from each for the full sum. The employees in question complained to the Union and an arrangement was entered into on March 7, 1936, between the Union and the respondent whereby the latter was to pay to the Union weekly the wages due its employees. Several days after this arrangement was concluded, Jack Horlick, the respondent's manager, asked each of the employees individually to "kick back" \$5 of their wage. All refused to do so and were thereupon threatened by Horlick in various ways. To one employee who stated that he could not afford to turn over \$5, Horlick said, "Well, you will have to find a way because we will have ways of fixing everybody up". To another who refused he said, "All right, Gus, you will see." A third was informed that there are "two ways of getting rid of a man."

4. Jack Anis, a waiter, was discharged by the respondent on March 18, 1936. Anis was employed in Los Angeles, California at the time of the hearing and consequently did not testify but the circumstances of his discharge were related by other employees.

The waiters at the Club Troika work together in teams of two. On March 6, 1936, Anis and his partner each made out a check for a patron they were serving. The patron paid one of the checks, so that the second check was outstanding and still on file at the close of the business day. The matter was explained by the two waiters to Horlick who accepted their explanations and marked the check "error". Duplicate checks are not unusual and many of the waiters had made similar errors in the past which went undisciplined.

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<sup>3</sup> Two employees were applicants for membership. One of them, Taparata, had applied for membership in the Union about March 15, 1936, and became a full member about March 21, 1936, after he was locked out as found below.

On March 18, Anis told his partner, Chresohos, that he had been discharged. The two asked the head waiter for the reason and at that time were informed Anis had been discharged because of his membership in the Union, the head waiter stating, "Jack, if you want to know why you are fired, the reason is the Union". Later in the day, when Verbov, business agent of the Union, called to investigate the discharge, the head waiter stated that Anis had been discharged because he had permitted a "walk out" (allowing a patron to leave without paying his check). The charge was based upon the incident of March 6, and did not extend to an accusation of dishonesty, but merely of negligence, on Anis' part. Verbov asserted that the check was obviously a duplicate, but nevertheless offered to pay the amount of the check in full, although usually the respondent's waiters were required to pay only 50 per cent of the amount in such cases. The head waiter replied that Mrs. Hamilton, the respondent's president, had ordered Anis' discharge and no compromise was possible.

In the light of the triviality of the offense claimed to have been committed, the lapse of time between offense and discharge, the hostile attitude of the respondent toward an organization which had successfully checked its plan to operate at the expense of the employees, and the statement made to Anis and Chresohos on the day of the discharge, the conclusion is inescapable that Anis was discharged because of his membership in the Union. The events of the next day, related below, further support that conclusion.

5. On March 19, the respondent locked out all of the Union waiters. As each reported for work he was informed that Union members would not be permitted to remain in the respondent's employ. To Berseneff, Mrs. Hamilton said, "Are you with the Union or not. If you are with the Union, you cannot work here." Horlick added: "You can stay here if you wish to providing you are through with the Union". Chresohos was given similar terms by the head waiter who said, "Today we have to settle this Union business once and for all. I have orders from Mrs. Hamilton not to let anybody in who will stick with the Union. Are you with the Union or not." Chresohos replied, "I am with the Union", and the head waiter said, "You will have to stay out". To two other employees, Sonya Tourey and Sam Dubenow, Mrs. Hamilton said, "Are you going to be with us or with the Union?—and if you are with the Union, you can get the hell out of here". When Frank Taparata reported for work, Mrs. Hamilton was at the door and asked, "Are you with the Union?" Taparata said, "Yes"; and she replied, "You will have to stay out". Horlick then said, "I am sorry, boys, no locals in this place". The other employees, Shmyr and Marder, were likewise locked out. The

Union employees then picketed the respondent's place of business. Non-Union waitresses were employed in their place.

That the above employees were discharged because of their membership in the Union and the activity of the Union is obvious. The motive is equally clear—the Union had succeeded in forcing the respondent to pay wages to its employees and had made it impossible for the respondent to collect “kick-backs”. The respondent desired to obtain profits through the device of not paying wages and this engaging business policy was obstructed by the Union. The respondent, without attempting to resort to subtle measures, simply discharged all of its Union employees and thereby hurled the obstruction. Few cases before the Board have involved such a deliberate and open violation of the Act. These discharges and the discharge of Anis constitute interference with, restraint and coercion of the respondent's employees in the exercise of the rights guaranteed in Section 7 of the Act and discrimination in regard to hire and tenure of employment thereby discouraging membership in the Union. The appropriate remedy is reinstatement with back pay from the date of discharge.<sup>4</sup> In the restaurant trade tips received by a waiter are generally regarded as part of his salary, so that the wage paid by the employer is lower than what would normally, and otherwise, be paid. The record indicates that the respondent so regarded the tips received by its employees, since for weeks it paid no wages. Even later, when it paid \$10.50 a week, it still asked for a “kick back” of \$5. Consequently, in order that the discharged employees may be “made whole” the term “back pay” must under these circumstances be regarded as including both the wage paid and the tips received. The respondent must therefor pay to each of the discharged employees a sum computed upon the basis of a weekly total of \$10.50 plus an amount equal to the average weekly tips received in the three months prior to the discharge.

6. Eugene Solgala, the bartender and a member of the Bartenders' Union, left his position on March 19, 1936, in protest against the discharges of his fellow employees. As a member of a labor organization he felt that a common aim with the discharged employees to promote the organization of the workers compelled such action. His present unemployment is thus traceable to the respondent's unfair labor practices. Consequently, we shall order his reinstatement along with the other employees, but without back pay since his action was voluntary. *Cf. In the Matter of Sunshine Hosiery Mills*, decided April 29, 1936 (1 N. L. R. B. 664).

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<sup>4</sup> Prior to the time of the hearing some of the employees had earned small sums on odd jobs: Berseneff—\$50; Chresoehos—\$30; Dubenow—\$30-35; Marder—\$30-35; Taparata—\$25; Tourey—\$20. Berseneff and Tourey were employed at other restaurants at the time of the hearing.

## CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact and upon the entire record in the proceeding the Board finds and concludes as a matter of law:

1. Hotel and Restaurant Employees Alliance, Local 781, is a labor organization, within the meaning of Section 2, subdivision (5) of the Act.

2. Respondent, by discriminating in regard to the hire and tenure of employment of Jack Anis, Michelle Berseneff, Constantine Chresohos, Sam Dubenow, Charlie Marder, Peter Shmyr, Frank Taparata and Sonya Tourey, and each of them, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (3) of the Act.

3. 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 of Section 8, subdivision (1) of the Act.

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

## ORDER

On the basis of the findings of fact and conclusions of law and pursuant to Section 10, subdivision (c) of the Act, the Board hereby orders that respondent, Club Troika, Inc., and its officers and agents, shall:

1. Cease and desist:

(a) From discouraging membership in the Hotel and Restaurant Employees Alliance, Local 781, or any other labor organization of its employees, by discrimination in regard to hire and 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 their rights 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, as guaranteed in Section 7 of the National Labor Relations Act.

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

(a) Offer to Jack Anis, Michelle Berseneff, Constantine Chresohos, Sam Dubenow, Charlie Marder, Peter Shmyr, Frank Taparata, Sonya Tourey and Eugene Solgala, immediate and full reinstatement,

respectively, to their former positions, without prejudice to any rights and privileges previously enjoyed;

(b) Make whole said Jack Anis, Michelle Berseneff, Constantine Chresohos, Sam Dubenow, Charlie Marder, Peter Shmyr, Frank Taparata, and Sonya Tourey for any loss of pay they have suffered by reason of their discharge by payment, respectively, of a sum of money equal to that which each would normally have earned during the period from the date of his discharge to the date of such offer of reinstatement, computed on the basis of a weekly total of \$10.50 plus an amount equal to the average weekly tips received in the three months prior to the date of discharge, less any amounts earned subsequent to the date of discharge;

(c) Upon resumption of business in the fall, post notices in its place of business stating (1) that respondent will cease and desist in the manner aforesaid, and (2) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting.

**CHAIRMAN MADDEN** took no part in the consideration of the above Decision and Order.