

In the Matter of CLIFFORD M. DeKAY, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF D & H MOTOR FREIGHT COMPANY and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 649.

Case No. C-112.—Decided September 12, 1936

Motor Truck Transportation Industry—Interference, Restraint or Coercion: questioning employees regarding union affiliation; expressed opposition to labor organization, threats of retaliatory action—*Unit Appropriate for Collective Bargaining:* eligibility for membership in only organization among employees; occupational differences; craft—*Representatives:* proof of choice; application for membership in union—*Collective Bargaining:* refusal to meet representatives—*Strike—Reinstatement Ordered, Strikers:* strike provoked by employer's violation of law; displacement of employees hired during or following strike.

Mr. Daniel B. Shortal for the Board.

Phillips & Skinner, by *Mr. Samuel H. Skinner*, of Jamestown, N. Y., for respondent.

Mary Lemon Schleifer, of counsel to the Board.

DECISION

STATEMENT OF CASE

Upon a charge duly filed by International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 649, on April 8, 1936, the Regional Director for the Third Region, as agent for the National Labor Relations Board, issued a complaint on May 28, 1936, which alleged that Clifford M. DeKay, doing business under the trade name and style of D & H Motor Freight Company, Jamestown, New York, had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (3) and (5), and Section 2, subdivisions (6) and (7) of the National Labor Relations Act, approved July 5, 1935, hereinafter called the Act. The complaint and accompanying notice of hearing were duly served upon Clifford M. DeKay, hereinafter referred to as the respondent, and upon the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 649, hereinafter referred to as the Union.

The complaint alleged that the respondent had violated Section 8, subdivisions (1) and (3) of the Act by discharging Willard V. Tilyou, William H. Cowing, Ernest R. Furlow, Allen H. Crandall, Lloyd S. Odell, Lloyd A. Hall and Fred Cox on March 22, 1936, for joining and assisting the Union and by subsequently refusing to reinstate the above named individuals; and had violated Section 8, subdivisions (1) and (5) of the Act by refusing on March 22, 1936, to bargain collectively with the Union, which had been designated by a majority of the employees in an appropriate bargaining unit as their representative.

The respondent filed an answer on June 5, 1936, in which he denied the violation of Section 8, subdivision (5) and alleged that on March 22, 1936, he had told Carl H. Carlson, vice-president of the Union, that he could not talk to him at that time but to come back at some other time and denied that he had ever discharged or refused to reinstate any of the employees named in the complaint, except Lloyd S. Odell.

Pursuant to the notice of hearing, a hearing was held on June 8, 1936, at Jamestown, New York, before Emmett P. Delaney, Trial Examiner duly designated by the Board. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded to all parties. At the beginning of the hearing, counsel for the respondent moved to dismiss the complaint on the grounds that the Act is unconstitutional and that a copy of the charge had not accompanied the complaint served upon the respondent. At the time counsel for the Board rested his case and again at the close of the hearing, counsel for the respondent moved to dismiss on the ground that the allegations of the complaint were not supported by the evidence. These motions to dismiss were all denied by the Trial Examiner.

On June 15, 1936, the Trial Examiner filed his Intermediate Report in which he found that the respondent had discharged and refused to reemploy the seven named employees because of their union membership and activity and had refused to bargain collectively with the Union. He recommended that the respondent be required to cease and desist from such unfair labor practices and to offer reinstatement with back pay to the seven named employees. On July 6, 1936, the respondent filed exceptions to the Intermediate Report and to the rulings of the Trial Examiner on motions and objections to admission of evidence and exhibits. While all rulings of the Trial Examiner at the hearing are hereby affirmed, the Board finds that the evidence requires some modification of the Trial Examiner's findings, conclusions and recommendations.

Upon the entire record, including the pleadings, transcript of the hearing, the Intermediate Report and the exceptions thereto, the Board makes the following:

FINDINGS OF FACT

1. The respondent is engaged in the business of transporting freight by means of motor trucks owned and operated by him. At the time of the hearing the respondent owned seven trucks and employed 16 drivers and helpers and one extra helper to operate these trucks.

2. The respondent maintains two places of business. The principal one consists of an office and a garage at 417 Charles Street, Jamestown, New York. A branch office is maintained at 202 East 34th Street, New York, New York.

3. About 90 per cent of the hauling done by the respondent originates in Jamestown, New York and consists principally of furniture manufactured in the vicinity of Jamestown. The destination of most of the freight is New York City. The trucks in traveling to New York City use either Route 17 which lies wholly within the State of New York or Route 6 which runs through the States of New York, Pennsylvania and New Jersey. The testimony of the drivers indicates that more trips are made over Route 6 through New York, Pennsylvania and New Jersey than over Route 17. In addition, the respondent accepts occasional loads for such points as Boston, Massachusetts; Pittsburgh and Philadelphia, Pennsylvania; Cleveland, Ohio; Providence, Rhode Island; Hartford, Connecticut; and Chicago, Illinois. The respondent makes no differentiation between trucks and/or drivers as to destination or route.

The respondent, under the classification of a common carrier of freight, made application for and has received from the Federal Bureau of Motor Carriers, Interstate Commerce Commission, a certificate of convenience and necessity in accordance with the Motor Carriers Act, 1935.

4. The aforesaid operations of the respondent constitute traffic, commerce and transportation among the several States. The bus drivers and helpers operating the trucks owned by the respondent are directly engaged in such traffic, commerce and transportation.

5. Local Union No. 649, a local of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, affiliated with the American Federation of Labor, is a labor organization. Drivers and helpers employed by the respondent are eligible for membership in the Union, whose membership is not confined to employees of the respondent.

6. The complaint alleges that the drivers and helpers employed by the respondent constitute a unit appropriate for the purposes of collective bargaining. No evidence was presented at the hearing on behalf of the respondent concerning the appropriate unit. All of the respondent's employees except supervisory and clerical employees, who are not eligible for membership in the Union, are included in the unit alleged to be appropriate.

We find that the drivers and driver's helpers employed by the respondent constitute a unit appropriate for the purposes of collective bargaining.

7. The testimony shows that for some time prior to March 22, 1936, the drivers and helpers employed by the respondent had been discontented about wages and expenses incurred on the road which they were required to pay; that this discontent had reached a point where it was openly discussed in the garage; that the employees had expressed their determination to demand an adjustment of these matters on Saturday, March 21, and to strike if necessary but that for some reason unexplained by the testimony, the demands were not presented at the appointed time; and that the respondent in some manner had learned of the unrest. Tilyou¹ testified that some time after the men had been paid off on Saturday night, March 21, 1936, DeKay called him out of a restaurant next door to the garage and asked him what the dissatisfaction was about; that he explained that the road expenses were so great that sometimes they exceeded the payment received from a trip; and that DeKay said there was a rumor that some of the employees had joined a union but that he would let his trucks "rot" before he would recognize a union.

None of the respondent's employees belonged to a union at that time. However, the next morning, March 22, 1936, at about 10:30 A. M., ten of respondent's drivers and helpers made application for membership in the Union.² About 12:30 P. M. on the same day, the drivers and helpers who had scheduled trips to make came into the garage. The customary practice was that the trucks were taken out as soon after noon as they were loaded. The testimony as to what occurred on the day in question is meagre. Tilyou testified: "The bunch of us fellows went back and were standing around waiting for Mr. DeKay to come around. When he came around he wanted to know if we were going out and said that at 3:30 we would pull out. We told him that the boys were coming down to talk with him—meaning Mr. Strong and Mr. Carlson. . . . he said to

¹ One of the persons named in the complaint

² The applicants were Lloyd Hall, Lloyd S. Odell, William H. Cowing, Allen Crandall, Willard Tilyou, Fred Cox, Ernest Furlow, John Young, Murvel Chipman and Lester Aldridge.

Mr. Cowing, 'Are you with the rest of them?' I guess he said to Mr. Odell if he was going out and Mr. Odell said that he wouldn't do it until the rest of the boys came. He said, 'You can go now to your trucks.' Then he came out and asked Mr. Cowing if he was with the rest. Then Mr. Cowing said that he was. He says, 'All right, give me your keys', and he wanted the cards, the owner cards for the trucks. He sent two other men out on trucks in their places." Crandall¹ testified: "Why, we waited around. Mr. DeKay asked Mr. Cowing to go out. Bill Cowing refused to go . . . the boys told him they would wait until someone came to see him." No other employee testified as to what occurred. DeKay testified that the men stated to him that they were waiting for someone to come in and that subsequently Cowing gave DeKay the keys for his truck and the cards. .

DeKay testified that five trucks were loaded on Sunday afternoon to be taken out but that only four were sent. In naming the drivers and helpers who took out these trucks DeKay only gave the names of six employees, the number required to operate three trucks. All of these men except one were drivers who were then employed by the respondent. The one not a regular employee was identified by DeKay as a person "who hung around the garage" and who had worked "off and on in the garage".

The balance of the respondent's employees who had been in the garage apparently remained there without objection by DeKay until about 3:30 P. M., when Carlson, vice-president of the Union, and Strong, organizer for the Union, came into the garage, walked up to where DeKay was working at a desk and asked if they might talk to him. Although the evidence as to what occurred is conflicting, both the respondent and the Union witnesses agree that Strong and Carlson did not specifically identify themselves, did not tell DeKay that they claimed the right to represent a majority of his employees, and did not state that the purpose of their presence was to engage in collective bargaining with him. Strong, who is corroborated by some witnesses, testified that DeKay replied he was too busy to talk; that they then asked if they might come back later and were told by DeKay that he would be too busy; that they asked if that meant he would be too busy at any other time and DeKay replied that it did. DeKay, who is corroborated by other witnesses, testified that he said he was too busy to talk then but that he would later; that Carlson replied, "So you won't talk with us"; that he replied, "Not today", whereupon Carlson said, "There is other ways of making you talk."

The employees who had witnessed this encounter and were sympathetic to the demands which Strong and Carlson had attempted to

make, left the garage with them. The next day pickets were placed outside the garage, the picketing continuing for about five weeks. Ultimately, the pickets sought reemployment by the respondent or secured employment elsewhere. Among those who sought and secured reemployment by the respondent were Furlow,³ Young and Aldridge.

8. As previously stated, the complaint alleges that the employees named therein were discharged. The respondent contends that the acts of these employees constituted a strike. We believe the facts as developed by the testimony and as set forth above do not substantiate the allegation in the complaint, but on the contrary show a refusal of the employees to work until some adjustments in regard to wages and road expenses had been made.

The respondent testified that Odell had not been among the strikers, but had been discharged on Sunday morning, March 22, prior to the strike for dealing in stolen pads. Odell did not appear at the hearing because he was confined in a hospital. The respondent's statement as to his dishonesty appears questionable to us for several reasons. DeKay admitted he knew of the alleged dishonesty on Saturday, prior to the time that the men were paid off, but that he did not notify him at that time that he was discharged, and that he did not make up his mind to discharge him until Sunday morning. This seems strange. In addition, the employee witnesses testified that Odell was in the garage on Sunday afternoon, and Tilyou testified that DeKay had asked Odell if he was going out and Odell refused to do so until the rest of the boys came in. Lown, one of the respondent's witnesses who did not join the strikers, also testified that he saw Odell in the garage on Sunday afternoon, that he tried to secure repayment of some money Odell had borrowed from him, that Odell did not tell him he had been discharged but did tell him that they were going to strike for 50 cents an hour. The testimony of those employee witnesses seems strongly at variance with a discharge prior to these events. We hold that the respondent's contention as to the prior discharge of Odell is not established by the record.

We find that the respondent did not discharge the employees named in the complaint for joining and assisting the Union.

9. Of the seven persons alleged to have been discharged, only four testified. Of these four, Furlow has been reemployed by the respondent and Crandall, Tilyou and Cox testified that they had never asked the respondent to be reinstated. It seems apparent from the conditions existing at this time that in all probability the three persons who did not testify also did not apply for reinstatement. We will therefore dismiss the complaint that the respondent refused to rein-

³ One of the persons named in the complaint.

state the employees named in the complaint because they joined and assisted the Union.

10. The respondent defends the charge that he refused to bargain collectively upon three alternate grounds: (1) that the Union did not have a majority and did not therefore have the legal right to demand to bargain collectively; (2) that the Union made no demand to bargain collectively; (3) that the respondent did not refuse to bargain collectively with the Union.

(1) The respondent on March 22, 1936, employed 16 drivers and helpers who were regularly employed and one extra helper. The evidence shows that of the ten employees who made application for Union membership on March 22, only two paid the required initiation fee at the time the application was made; that one of the applicants has never paid his initiation fee and has not been voted upon by the Union; that none of the applicants were admitted to membership until the next Union meeting; and that three of the applicants, while accepted as members, were subsequently ousted by the Union when they sought and received reemployment by the respondent during the strike, so that only six of the respondent's drivers and helpers became and remained members of the Union. The respondent points to these facts to show that the Union did not represent a majority of his employees. Such a contention rests upon a misconstruction of the Act. Section 9 (a) of the Act states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees * * *". The Act says nothing about union membership. These applicants by requesting membership in the Union indicated their desire to have the Union act as their representative for the purposes of collective bargaining and thereby selected the Union for that purpose.

We find that since ten of the respondent's 17 employees made application for membership in the Union, a majority of the respondent's employees in a unit appropriate for the purposes of collective bargaining had designated the Union as their representative for collective bargaining on March 22, 1936.

(2) Although neither Strong nor Carlson made the customary and ordinarily necessary statements that they were the duly selected representatives of a majority of the respondent's employees and that the purpose of their presence was to bargain collectively with the respondent in respect to rates of pay, wages, hours of employment, and other conditions of employment, we believe that other facts established at the hearing show that the respondent knew the identity of Strong and Carlson, the capacity in which they called and the purpose of their request. The dissatisfaction and unrest among DeKay's employees concerning wages, of which he had knowledge,

the talk of joining a union and the refusal of employees to go out with the trucks until someone came in to see DeKay, were all indicative that some demands were about to be made by his employees. Although DeKay denied that Strong was in the garage on Sunday, March 22, and denied that he knew who Strong was, the denials are not supported by the weight of the evidence. De Kay admitted that he knew Carlson but denied knowledge of his Union affiliation. The failure of DeKay to ask the men the purpose of their request when considered in relation to the circumstances surrounding it indicates that DeKay was "too busy" to allow them to state their position and their demands because he knew who they were and what they wanted.

(3) We accept as accurate the testimony of Strong and of the employees who testified that DeKay stated he would have no time either on Sunday or at any other time to talk with Strong and Carlson. In doing so we are not unmindful of the denials by DeKay and some of the witnesses of the respondent. Most of these witnesses, however, testified only that they heard DeKay say he was busy at that time. It is notable that these employee witnesses, while willing to testify as to that portion of the conversation, evaded the question of whether he stated he would be too busy at all subsequent times. DeKay's credibility is subject to question for many reasons, the most important of which is his self-contradiction on several material points. He also denied that he had been called by a member of the National Labor Relations Board, prior to the issuance of the complaint. Rev. John P. Boland, Regional Director for the Third Region, himself testified, after this denial, in minute detail as to his conversation by telephone with DeKay, who refused to see him on the grounds that he was "too busy".

We find that the respondent on March 22, 1936, refused to bargain collectively with the Union.

11. The respondent by refusing to bargain collectively with the Union has interfered with, restrained and coerced 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 and other mutual aid and protection.

12. The respondent testified that he had lost a "lot" of business as a consequence of these labor troubles, that "certain truckers that turned the other way and ship (shipped) by other people would run into a lot of money * * * (The amount) would be hard to estimate. I know that other trucking concerns were given loads that were supposed to be ours." It is clear that the strike, prolonged by the respondent's refusal to bargain collectively, had a material effect upon his business.

We find that the aforesaid acts of the respondent occurred in commerce and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

13. The respondent by refusing to bargain collectively with the Union on March 22, 1936, placed obstacles in the way of settling the strike and prevented the possible return of these men to work. As we have held in similar cases,⁴ under like circumstances, effective relief can be granted only by ordering the respondent to reinstate his employees who went on strike on March 22, dismissing, if necessary, any persons not striking employees who were hired on March 22 or thereafter.

CONCLUSIONS OF LAW

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

1. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 649, is a labor organization, within the meaning of Section 2, subdivision (5) of the Act.

2. The drivers and helpers employed by the respondent constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 649, having been designated or selected on March 22, 1936, by a majority of the respondent's drivers and helpers as their representative for collective bargaining, by virtue of Section 9 (a) of the Act was on said date the exclusive representative of the respondent's drivers and helpers for the purposes of collective bargaining.

4. The respondent by refusing to bargain collectively with the Union on March 22, 1936, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (5) of the Act.

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

6. The unfair labor practices in which the respondent has engaged, and is engaging constitute unfair labor practices affecting

⁴ See *In the Matter of Columbian Enameling & Stamping Co.*, decided February 14, 1936 (1 N. L. R. B. 181); *In the Matter of Rabhor Company, Inc.*, decided April 7, 1936 (1 N. L. R. B. 470); *In the Matter of Jeffery-De Witt Insulator Company*, decided April 24, 1936 (1 N. L. R. B. 618); *In the Matter of Columbia Radiator Company*, decided June 2, 1936 (1 N. L. R. B. 847).

commerce, within the meaning of Section 2, subdivisions (6) and (7) of the Act.

7. The respondent did not discharge and refuse to reinstate Willard V. Tilyou, William H. Cowing, Ernest R. Furlow, Allen H. Crandall, Lloyd S. Odell, Lloyd A. Hall and Fred Cox for joining and assisting the Union, and did not thereby engage in unfair labor practices, within the meaning of Section 8, subdivision (3) 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 National Labor Relations Act, the National Labor Relations Board orders that:

1. The respondent, Clifford M. DeKay, doing business under the trade name and style of D & H Motor Freight Company, and his agents, shall cease and desist from refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 649, as the exclusive representative of his drivers and helpers in respect to rates of pay, wages, hours of employment, and other conditions of employment.

2. The respondent, Clifford M. DeKay, doing business under the trade name and style of D & H Motor Freight Company, shall take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 649, as the exclusive representative of the drivers and helpers employed by him;

(b) Offer employment to the drivers and helpers who went on strike on March 22, 1936, and who have not received substantially equivalent employment elsewhere, dismissing, if necessary, persons who have been hired on and after March 22, 1936, who were not among the employees who struck;

(c) Post notices in conspicuous places in the garage stating that (1) the 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.

3. The complaint be dismissed as to the allegations that the respondent discharged and refused to reinstate Willard V. Tilyou, William H. Cowing, Ernest R. Furlow, Allen H. Crandall, Lloyd S. Odell, Lloyd A. Hall and Fred Cox for joining and assisting the Union.