

In the Matter of UNITED FRUIT COMPANY and RICHARD SCHUIDT and
GUS CARLSON

Case No. C-159.—Decided June 1, 1937

Water Transportation Industry—Discrimination: charges of not sustained, complaint dismissed.

Mr. David A. Moscovitz for the Board.

Mr. William K. Jackson and *Mr. John L. Warren*, of Boston, Mass., for respondent.

Mary Lemon Schleifer, of counsel to the Board.

DECISION

STATEMENT OF CASE

On December 8, 1936, Richard Schuidt filed a charge with the Regional Director for the Second Region (New York, New York), alleging that United Fruit Company, New York, New York, hereinafter referred to as the respondent, had engaged in and was engaging in unfair labor practices within the meaning of the National Labor Relations Act, 49 Stat. 449, hereinafter referred to as the Act. On January 6, 1937, the Regional Director duly issued and served upon the parties a complaint and notice of hearing. The complaint alleged that the respondent had violated Section 8, subdivision (2) of the Act, by dominating and interfering with the administration of an organization known as the Cargo Handlers' Association and by contributing financial and other support to it; had violated Section 8, subdivision (3) of the Act by discharging and refusing to reinstate Richard Schuidt on or about November 16, 1936, because of his union activities and because he had refused to join the Cargo Handlers' Association; had violated Section 8, subdivision (1) of the Act because of the above mentioned violations of Section 8, subdivisions (2) and (3), and by other Acts; and that the aforesaid unfair labor practices were unfair labor practices affecting commerce within the meaning of Section 2, subdivisions (6) and (7) of the Act. On January 9, 1937, the respondent filed an answer denying, in respect to the alleged unfair labor practices, the allegations of fact and the conclusions therefrom set forth in the complaint.

On January 12, 1937, the Regional Director issued and duly served notice on the parties, that pursuant to an amended charge filed that day, the National Labor Relations Board, hereinafter referred to as the Board, would move at the hearing that the complaint be amended

to include the additional allegation that the respondent had violated Section 8, subdivisions (1) and (3) of the Act by discharging and refusing to reemploy Gus Carlson on or about November 27, 1936.

Pursuant to an amended notice of hearing issued and duly served upon the parties a hearing was begun on February 2, and continued on February 3 and 4, 1937, in New York City before A. Howard Myers, the Trial Examiner duly designated by the Board. The respondent was represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all parties. The Trial Examiner in the absence of any objection by the parties allowed the Board's motion to amend the complaint. Counsel for the respondent then filed an answer denying the allegations set forth in the amended complaint concerning Gus Carlson. Counsel for the respondent also moved that the complaint be dismissed because the persons named in the complaint were not employees within the meaning of the Act and on the further grounds that the Act is unconstitutional generally and as applied to the respondent. The Trial Examiner denied the motion during the course of the hearing. Near the close of the hearing counsel for the respondent moved to dismiss the complaint on the ground that no evidence had been adduced to sustain the allegations. The Trial Examiner reserved ruling on the motion. Objections were made by counsel for the respondent and by counsel for the Board to the introduction of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings on motions and objections are hereby affirmed.

On March 16, 1937, the Board, acting pursuant to Article II, Section 37, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered the case to be transferred to and continued before it.

On April 28, 1937, Richard Schuidt and Gus Carlson requested permission to withdraw the charge which alleged that the respondent had committed unfair labor practices within the meaning of Section 8, subdivision (2) of the Act. The Board hereby consents to the withdrawal.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. THE RESPONDENT'S BUSINESS

The respondent, a New Jersey corporation with its principal office and place of business in Boston, Massachusetts, is engaged, by itself and through various wholly-owned and controlled subsidiaries,

in the growth, purchase, transportation, sale, and distribution of bananas and other tropical products; in the operation of a line of steamships for the transportation of passengers, freight, and mail, in addition to the transportation of bananas and other tropical products; in the operation of a system of communication, including telephone and telegraph lines and radio systems; and in the operation of railway and tramway systems.

The bananas and other tropical products handled by the respondent are grown or purchased in tropical countries in Central and South America and the West Indies. In such countries, the respondent by itself or through its subsidiaries, employs approximately 48,000 employees; owns 3,430,000 acres of land, of which approximately 435,000 acres are under cultivation; leases 65,000 acres of land, of which 14,000 acres are cultivated; operates approximately 1,800 miles of railway lines, 450 miles of tramways, and 3,600 miles of telephone and telegraph lines; and maintains a chain of high powered radio and telegraph stations located in Colombia, Costa Rica, Honduras, Nicaragua, and Panama, the United States terminals being located at New Orleans, Louisiana; Boston, Massachusetts; and Hialeah, Florida.

The respondent's steamships, approximately 50 in number, carry passengers, mail, and freight between the Atlantic ports of Boston, Massachusetts; New York, New York; Philadelphia, Pennsylvania; Baltimore, Maryland; Charleston, South Carolina; Mobile, Alabama; New Orleans, Louisiana; and Cuba, Jamaica, and the Atlantic ports of Central America and Colombia, South America, and through the connecting lines of the Panama Canal with the west coast ports of South America. These steamships carry annually approximately 50,000 passengers and 890,000 tons of freight, in addition to transporting the respondent's fruit and products. Approximately 31,000,000 stems of bananas are carried on these vessels annually.

The respondent imports bananas and other tropical products through various ports of the United States, including the port of New York. At Piers 3, 7, and 9, New York City, such products are immediately unloaded from the ships into trucks or railroad cars for distribution. The Fruit Dispatch Company, a wholly-owned subsidiary of the respondent with approximately 50 branch offices throughout the United States, acts as the selling agent of the respondent in the United States and is in charge of the products of the respondent from the point of importation to the point of destination.¹

¹ All the above facts concerning the respondent's business are taken from a stipulation which was introduced in evidence at the hearing.

We find that the respondent is engaged in trade, traffic, transportation, and commerce among the several States, and between the United States and foreign countries, and that the employees of the respondent engaged in the unloading of bananas and other products on the New York piers of the respondent are directly engaged in such trade, traffic, transportation, and commerce.

II. THE LABOR ORGANIZATIONS INVOLVED

International Longshoremen's Association, hereinafter referred to as I. L. A., is a labor organization affiliated with the American Federation of Labor. Local No. 856, I. L. A., of which Richard Schuidt and Gus Carlson are members, has jurisdiction over longshoremen engaged in handling deep sea cargo on the New York piers. On January 31, 1936, I. L. A., as representative of the employees of the respondent on the New York piers, entered into a contract with the respondent. This contract expired on October 31, 1936, and no contract has been signed by the respondent since that time either with I. L. A. or with any other labor organization.

The Cargo Handlers' Association, hereinafter referred to as the Association, was organized among the respondent's employees on Pier Number 7, New York City, during October and November, 1936. The evidence shows that while the respondent has made no contract with the Association, a committee selected by the Association members has met with Charles C. Baldwin, superintendent of navigation and manager of pier operations, and other officials of the respondent. At these meetings working conditions were discussed and some adjustments or changes were made because of the demands of the Association. We find, therefore, that the Association is a labor organization.

III. THE RESPONDENT'S EMPLOYEES

Pier Number 7 of the respondent is used almost exclusively for the unloading of bananas from ships coming from tropical countries. The time of arrival of each ship is posted on the pier and longshoremen desiring to secure work congregate in the street outside the pier prior to the docking of the ship. The respondent determines how many men will be needed to unload each ship and out of the longshoremen on the street selects the required number by a process called "shaping". One or more representatives of the respondent called "shapers" go out into the street in front of the pier, select the men they wish, and give them a small paper disk. The men so selected line up on the pier and pass to the paymaster's office, where they give their names and receive a metal disk or pass in exchange for the paper disk. Their time of beginning work is recorded and

they go on down the pier to work. When the ship has been unloaded² the worker again goes to the paymaster's office, surrenders his metal disk, and receives payment for that particular job.³ He secures his next job only by being selected or "shaped" in the same manner.

The number of men required to unload a ship varies from 275 to 525, depending on the size of the ship and its construction. Ships arrive at the pier every day in the week including Sunday. It is apparent that either because they cannot be used or because they do not wish to work every day, these longshoremen do not have continuous and regular employment in the same sense that an employee has in the ordinary industrial plant. However, the respondent admits and the records of employees who testified show, that there is in the main a regular and continuous reemployment of the same longshoremen. We think that such longshoremen, including Carlson and Schuidt, who are constantly reemployed for such work, are employees of the respondent even though, because of the nature of the work, they are not "shaped" for every ship.

IV. THE ALLEGED DISCRIMINATORY DISCHARGES

Gus Carlson has been employed by the respondent on Pier Number 7 for about six to eight years. He unloaded bananas, and on occasion, other cargo from the ships. In addition, he acted as a rigger, i. e., an employee who goes on the ship immediately upon its arrival and puts in the machinery necessary to unload it and removes the machinery after unloading is completed. Carlson is a member of Local No. 856, I. L. A. He refused to join the Association when solicited to do so.

Carlson's employment record from January 1, 1936, to December 1, 1936, as submitted by the respondent, is as follows:

<i>No. of hours employed</i>		<i>No of hours employed</i>	
January-----	147½ hours	July-----	157 hours
February-----	122½ hours	August-----	153 hours
March-----	80½ hours	September-----	134 hours
April-----	105½ hours	October-----	93½ hours
May-----	121½ hours	November-----	138½ hours
June-----	113½ hours		

The employment records of 15 employees selected at random were requested by the Trial Examiner for the purpose of securing a cross

² The average time of unloading is about 10 hours

³ Daily payment was one of the problems discussed by the Association with respondent. At the Association's request to have all men paid weekly, the respondent agreed to make weekly payments to those men who wished it. Baldwin testified that very few employees had requested to be paid weekly

section of the regularity of employment of these longshoremen. These records show the following:

Month	Greatest number of hours worked by any of the 15	Least number of hours worked	Month	Greatest number of hours worked by any of the 15	Least number of hours worked
January.....	220½	29	July.....	176	59
February.....	193	27	August.....	190	57
March.....	221	44	September.....	164½	57
April.....	184½	21	October.....	167	66
May.....	194	46	November.....	188	61
June.....	182	8			

From a comparison of Carlson's working hours with these figures it is apparent that for whatever cause Carlson did not work as many hours in any month as some other employees worked. It may be that the explanation is, as Breuh, head stevedore of the respondent, testified, that when he "shaped" he frequently did not select Carlson. Or it may be that Carlson did not seek work at all available times and that he was, as he testified, "shaped" every time he went to work. It is significant that Carlson, in addition to handling bananas and other cargo during the working day, also acted for about an hour both before unloading commenced and after it was completed, as a rigger. It would seem that if Carlson had worked at all times his number of working hours would have exceeded those of other workmen who were not riggers.

A summary of the evidence concerning Carlson's alleged discharge shows that on December 3, 1936, about one month after the election of officers of the Association and while the Association was making a concerted drive to secure members, John Dugan, president of the Association, and Lefty Russo, an active member of the Association, told Carlson at noon time that if he did not join the Association he could not continue to work; that the next morning Carlson was not selected in either the first or a subsequent "shaping"; that he went to Breuh after the second "shape" and complained, stating he had not been selected because the respondent had instructed the men in charge of "shaping" to select only members of the Association; that Breuh denied the charge, stating he would investigate the situation and instructed Carlson to return later in the day; that Carlson returned that afternoon and Breuh informed him he had discussed the matter with the men in charge of "shaping" that morning and they stated they had nothing against Carlson and had not selected him solely because they had not seen him; that Breuh instructed Carlson to come back to work on Monday morning; that Carlson did not get to work on Monday in time for the first "shaping", which

by his own admission is the one he had always been selected for prior to this time; that Carlson stayed for the second "shaping" but was not selected; and that he made no effort to see any official of the respondent at that time, nor did he go back to the pier to secure work from that day until approximately two months later, four days before the hearing in this case.

We do not feel, in the light of Carlson's employment record, that we are justified on this evidence alone in holding either that the respondent refused employment to Carlson or that if it did, it was for the purpose of encouraging or discouraging membership in a labor organization.

Richard Schuidt has unloaded bananas and other cargo on Pier Number 7 for about five or six years. He is a member of Local No. 856, I. L. A., and did not join the Association.

Schuidt's employment record for 1936 is as follows:

	<i>No. of hours employed</i>		<i>No. of hours employed</i>
January -----	58½ hours	June -----	59½ hours
February -----	59½ hours	July -----	60 hours
March -----	75 hours	August -----	77½ hours
April -----	21 hours	September -----	84½ hours
May -----	83 hours	October -----	85 hours

Schuidt explains this record in the following manner:

"Q. And after the settlement of the strike (December, 1935), did you work steadily for the company as you had before the strike?

"A. Well, for a time, for about a few weeks I did, and we had a little rumpus down there on Pier 3, outside of the dock there, . . .

"Q. I see, all right now. When did you shape up, next, after that?

"A. Why, after that I shaped up, but I was not put on for quite a while after that, for about two months.

* * * * *

"Q. And then what happened?

"A. They had to . . . I had to see my delegate.

"Q. Yes, what?

"A. I had to get my delegate to go up to the office . . .

* * * * *

"Q. And then did you shape?

"A. I shaped.

"Q. And did you get work?

"A. I got the regular four hours.

* * * * *

"Q. All right, before this new shaping that took place as a result of Mr. Giblen's (I. L. A. delegate) conversation with Mr.

Smith, had you been in your regular shapes working more than four hours?

"A. No, four hours, five hours and off and on like that, that is all, and sometimes I would make maybe two ships a week.

* * * * *

"Q. Did you ever work more than four hours after that?

"A. Well, I worked four hours sometimes and sometimes, why I would get a little more and then you would be cut down, then a little more again and cut down, so I went to see Mr. Giblen again.

* * * * *

"Q. Now, after that, did you continue working for the company?

"A. Yes, for a while until I had another argument with a fellow . . . After that I got two more months off.

* * * * *

"Q. Now, did anything happen after that in so far as your employment was concerned, were you shaped up continuously after that?

"A. Well, not continuously. You would get one ship and maybe I would be left out on a Thursday and get another ship on Friday . . ."

On October 30, 1936, the Association held a meeting for the nomination of officers. The meeting was held off the pier after working hours. Schuidt testified that although not a member of the Association, he went to the meeting and tried to make a speech, but that he got into an argument and was forced to leave. Either at that meeting or a meeting held on November 2, 1936, for the election of officers of the Association, Schuidt testified he stood in the hall below and urged the men to vote for "Fifty" who was "not implicated in any way with the bosses". He further testified in regard to his activities:

"A. I meant that I got a shellacking, that is what I meant.

"Trial Examiner Myers: What does that mean?

"A. I got a beating.

"Trial Examiner Myers: By whom?

"A. About two—it was two aft men—

"Trial Examiner Myers: You got a beating, you mean a physical beating?

"A. A physical beating in the paymaster's room of the United Fruit Company.

"Trial Examiner Myers: Well, what was that caused by?

"A. That was caused because I was standing outside of this place there and telling the men to vote for Fifty.

"Q. . . . You did have a fight with the men there out on the pier? . . .

"A. I didn't have no fight, I walked in to cash a check and one of them threw something at me and the other rapped me——

"Q. What did you say to them?

"A. I didn't say anything to them, I called a cop."

Apparently, the day of the fight in the paymaster's room or the day before, was the last day on which Schuidt was selected. He testified that he was at the pier every day for the following three weeks but that he was never "shaped".

As distinguished from Carlson, the record indicates that Schuidt was refused employment by the respondent. Schuidt feels he was the unfortunate victim of unprovoked assaults by fellow employees, but by his own admission such altercations in the past resulted in the respondent's refusal to "shape" him for a certain length of time. It may be that the failure of the respondent to "shape" Schuidt for three weeks after the fight in the paymaster's office was due to the fight in the office. In any event, whatever reason the respondent had for refusing to "shape" Schuidt, we cannot find on the evidence before us that the refusal was for the purpose of encouraging or discouraging membership in a labor organization.

We find that the respondent has not discriminated in regard to hire and tenure of employment of Richard Schuidt and Gus Carlson for the purpose of encouraging or discouraging membership in a labor organization.

We find that the respondent has not interfered with, restrained, or coerced its employees in the exercise of the rights of 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 purposes of collective bargaining and other mutual aid and protection.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact and upon the entire record in the proceeding, the Board makes the following conclusions of law:

1. The operations of the respondent, United Fruit Company, occur in commerce, within the meaning of Section 2, subdivision (6) of the Act.
2. Local No. 856, International Longshoremen's Association, is a labor organization, within the meaning of Section 2, subdivision (5) of the Act.
3. Cargo Handlers' Association is a labor organization, within the meaning of Section 2, subdivision (5) of the Act.

4. At the time of the events set forth in Section IV above, Richard Schuidt and Gus Carlson were employees of the respondent within the meaning of Section 2, subdivision (3) of the Act.

5. The respondent has not discriminated in regard to the hire and tenure of employment of Richard Schuidt and Gus Carlson and thereby encouraged or discouraged membership in a labor organization, within the meaning of Section 8, subdivision (3) of the Act.

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

ORDER

Upon the basis of the above 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 hereby grants the respondent's motion to dismiss on the grounds that the evidence does not sustain the allegations of the complaint.