

In the Matter of CARDINALE TRUCKING CORPORATION and INTERNATIONAL ASSOCIATION OF MACHINISTS

Case No. C-225.—Decided February 11, 1938

Motor Transportation Industry—Interference, Restraint, and Coercion: engendering fear of loss of employment for union membership and activity—*Discrimination:* discharges of active union members—*Reinstatement Ordered:* of two employees discharged for union activity, complaint dismissed as to one employee discharged—*Back Pay:* awarded for period from date of discharges to date of Intermediate Report and from date of Order to date of offer of reinstatement.

Mr. Will Maslow, for the Board.

Mr. John J. Fallon, of Hoboken, N. J., for the respondent.

Isserman & Isserman, by *Mr. Morris Isserman*, of Newark, N. J., for the Union.

Mr. Victor A. Pascal, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges duly filed by the International Association of Machinists, herein called the Union, the National Labor Relations Board, herein called the Board, by Elinore Morehouse Herrick, Regional Director for the Second Region (New York City), issued its complaint, dated May 26, 1937, against Cardinale Trucking Corp.,¹ Whippany, Morris County, New Jersey, herein called the respondent. The complaint alleged that the respondent had engaged and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act, in that it had discharged and had refused to reinstate Michael Henecke, August Santa Maria, and Patrick O'Connell because they joined and assisted the Union, thereby discouraging membership in the Union.

¹In some of the pleadings, the respondent is erroneously referred to as "Cardinale Trucking Corporation."

On June 17, 1937, the respondent filed its answer denying some of the allegations in the complaint and setting forth matter which, it is contended, constituted a defense. The answer also stated that the services of O'Connor, who was erroneously designated in the complaint as O'Connell, and Santa Maria had been dispensed with because the respondent no longer had need for their services, and that Henecke had been discharged for sufficient cause.

Pursuant to the notice, a hearing was held in New York City on June 17 and June 18, 1937, before Alvin J. Rockwell, the Trial Examiner duly designated by the Board. The Board and the respondent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues was afforded to all parties.

At the opening of the hearing, counsel for the Board moved to amend the complaint so as to change the name Patrick O'Connell to Patrick O'Connor. The respondent consented to this amendment and the motion was granted.

During the course of the hearing, the Trial Examiner made several rulings on objections to the admission of evidence. The Board has reviewed these rulings and the rulings made with respect to motions made by the parties, and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

Thereafter the Trial Examiner filed his Intermediate Report, dated August 16, 1937, in which he found that the respondent had not engaged in unfair labor practices as charged in the complaint and recommended its dismissal.

On September 3, 1937, the Union filed exceptions to the findings of fact and the conclusions of the Trial Examiner and requested to be heard in oral argument before the Board. On September 14, 1937, a hearing for the purpose of oral argument was held before the Board at which the respondent and the Union were represented by counsel, and affidavits filed by the Union were received.

By its order dated October 19, 1937, the Board directed that a further hearing be held for the purpose of taking testimony as to the employment of new men to replace the men alleged to have been discharged in violation of the Act, and as to the manner in which repair work in the respondent's garage was then being carried on. Pursuant to this order, a hearing was held in New York City on October 25, 1937, before Alvin J. Rockwell, the Trial Examiner duly designated by the Board. The Board, the Union, and the respondent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues was afforded to all parties.

During the course of the hearing, the Trial Examiner made several rulings on objections to the admission of evidence. The Board has reviewed these rulings and the rulings made with respect to other motions of the parties, and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent is a New Jersey corporation organized March 31, 1925. Since 1933, its principal place of business has been in Whippany, Morris County, New Jersey. It is engaged in the trucking business and uses motortrucks, tractors, and trailers, all of which it owns, to carry merchandise between two mills in Whippany and points within and without New Jersey. In its schedules filed with the Interstate Commerce Commission, it appears that the respondent uses 198 routes, 28 of which are wholly within New Jersey or New York and 170 of which are between two or more States.

The respondent's gross annual income totals approximately between \$150,000 and \$200,000.

The respondent's pay roll lists 71 individuals, including its officers, supervisors, chauffeurs, mechanics, and other employees. It appears that about eight men were usually employed in the respondent's repair shop, which is situated in part of its garage in Whippany. This repair shop is operated on two shifts, the day shift working from seven a. m. to seven p. m. and the night shift from seven p. m. to seven a. m. Most of the repairs to the respondent's trucks, tractors, and trailers are performed in this repair shop, although it appears that, occasionally, some of this work is performed out of the shop by the manufacturers of this equipment and that, in the event that any of the equipment is disabled too far from the respondent's garage to be towed back conveniently, it is repaired in a repair shop near the place where the accident occurred.

II. THE UNION

International Association of Machinists is a labor organization affiliated with the American Federation of Labor admitting to its membership employees of the respondent employed in its repair shop.

III. THE UNFAIR LABOR PRACTICES

A. Evidence presented at the first hearing

Michael Henecke was employed by the respondent about four years prior to the hearing in this case as a motortruck mechanic. For

about 11 years before, he had worked for other employers as a motor-truck mechanic. On January 10, 1937, James G. Cardinale, the respondent's president, promoted Henecke to the position of service manager and increased his salary from \$40 to \$45 a week. Henecke's duties in his new position required him to perform the same general type of work which he formerly had done and also to supervise the employees in the repair shop. About April 12, 1937, Cardinale told Henecke that he was dissatisfied with his supervision of the repair shop; he complained that the mechanics were wasting time and not completing a sufficient amount of work, and that the cost of the work performed was too great. Henecke voluntarily began working during the night instead of the day, as he believed that the former shift required strict supervision. At this time, his salary was increased to \$50 a week.

At the hearing, Henecke testified that, when he left the repair shop the morning of April 13, 1937, he received permission to come in late that evening so that he might call for his grandmother in New Rochelle. Henecke did not visit his grandmother that evening but, instead, called on John D. Lengel, business representative of the Union, at its Newark Lodge No. 340. He paid part of his membership initiation fee, and Lengel gave him several of the Union's membership application blanks so as to have them executed by the respondent's other mechanics. Henecke testified that he returned to the repair shop between 10 and 11 p. m., although a witness for the respondent put the time at 11 p. m. During the following week, six of the Union's application blanks were signed by repair shop employees.

According to Henecke, he telephoned to the respondent on April 20, 1937, at 7:07 p. m., and secured permission to be late in reporting to work. That evening, Henecke again went to the Union's office, delivered the six signed membership application blanks to Lengel, and was formally initiated into membership in the Union's Newark Lodge No. 340. Henecke testified that he returned to work at 10:10 p. m., although a witness for the respondent stated that it was at a later hour. As Henecke was commencing work the next night, Cardinale berated him for coming in late and "corrupting the other employees" and asked him to explain the cause of the latenesses. Henecke answered that he had been late on both nights because he had been attending a Diesel school. Cardinale replied that it was improper for him to attend a Diesel school during working hours, especially as the respondent used no Diesel engines. Cardinale then discharged Henecke, stating that he was being discharged, not for coming in late, but for lying.

August Santa Maria was hired by the respondent about November 1936 as a repair shop employee at the salary of \$30 a week. He per-

formed overhauling, boring, reaming, and general repair work. For about 19 years previous, he had been employed elsewhere as an automobile mechanic. About April 1, 1937, his salary was increased to \$35 a week. On April 13, 1937, Santa Maria visited Lengel at the Union's offices, and, according to Lengel, received application blanks for membership in the Union, and was told to distribute them among the employees in the repair shop. Santa Maria testified that he told other employees that he was joining the Union. He was formally initiated into membership in the Union's Newark Lodge No. 340 on April 20, 1937. As Santa Maria was reporting to work at 7 a. m. on April 22, 1937, Cardinale discharged him, although offering to give him a reference.

Patrick O'Connor was hired by the respondent on March 18, 1937, as an automotive machinist at the salary of \$35 a week. For about 15 years before, he had been employed elsewhere in the same capacity. In the latter part of March 1937, he applied for membership in the Union, and he was formally initiated into its Newark Lodge No. 340 on April 13, 1937. As O'Connor was reporting for work on April 22, 1937, at about 7 a. m., he was informed that he was discharged because "the boss wanted to keep down expenses." O'Connor testified that, as he was leaving, he heard Cardinale tell Alexander Chitko, one of the mechanics in the repair shop, that "he would not allow any Union men in his shop." At the hearing, Cardinale denied that he had made this statement, and Chitko denied that he had heard it.

Lengel and the three discharged employees visited the respondent's place of business on April 23, 1937. Henecke and Lengel testified that they waited for Cardinale in the anteroom of the office, observed him enter his office followed by Samuel Oplinger and another man, and that, through the open transom above the door of Cardinale's office, they heard the conversation of these men. Henecke and Lengel further testified that they heard Oplinger say to Cardinale, "What is the matter with Mike?" and that Cardinale answered, "I discharged him for joining a Union." At the hearing, both Cardinale and Oplinger denied that this conversation had taken place. Oplinger further testified that he had not been in Cardinale's office on that day. In testifying as to the physical arrangements of the respondent's place of business, Cardinale stated that the door of his office is separated from the anteroom by another room about 15 feet wide which is used by the respondent's clerical employees and that, although there is a transom above the door of the anteroom, there is no transom in his office, the door of which had been kept closed all that day.

Lengel's and Cardinale's testimony differ as to the substance of their conversation when they met that day in the anteroom. They both agree, however, that Cardinale did not then say that he had discharged the three men for joining the Union. Cardinale testified that Henecke

had been discharged for lying to him. Cardinale further stated that O'Connor and Santa Maria had not been discharged, but that they had been "laid off" for the reason that the respondent did not need as many mechanics as it did before because it had decided to have the major part of its overhauling work performed outside of its repair shop. He further testified that the respondent had hired no mechanics to replace the three discharged employees. The record does not clearly indicate the amount of work performed outside of the respondent's repair shop either prior or subsequent to April 22, 1937, or that there was a material change in the method of operating its repair shop subsequent to this date.

Cardinale testified that the respondent had no objection to its employees belonging to a labor union and that all of its chauffeurs were members of Local 560 of the International Brotherhood of Chauffeurs, Stablemen, and Helpers of America. It does not appear that any of the respondent's other employees belonged to a labor union prior to April 13, 1937.

B. Intermediate proceedings before the Board

As stated above, oral argument on the Union's exceptions to the Intermediate Report was held before the Board. The Union requested the Board to overrule the recommendations of the Trial Examiner. It stated that there had been no change in the quantity of the work performed for the respondent outside of its repair shop since April 22, 1937, and, since that date, at least two men had been hired to replace the discharged employees. It filed the affidavits of the three discharged employees to the same effect. The respondent stated that none of the respondent's reconstruction and alteration work was then being performed by its employees. By its order dated October 19, 1937, the Board ordered that a further hearing be held for the purpose of hearing evidence as to employment of new men to replace the men alleged to have been discharged and as to the manner in which repair work in the respondent's garage was then being carried on.

C. Evidence presented at the second hearing

The evidence adduced at this hearing fails to show that there was any change in the quantity of work which was performed for the respondent outside of its repair shop either prior or subsequent to April 21 and 22, 1937, the dates of the discharge of the three men.

The respondent's witnesses testified that, since October 2, 1937, the respondent had leased its entire repair shop to the Whippany Truck Manufacturing Corp., herein called the corporation, an enterprise controlled by one Alfred Engels and that, since that date, the

corporation had been doing all of the mechanical work which the respondent formerly had performed in its repair shop. Both Cardinale and Engels testified that neither the respondent nor any of its officers had any financial interest in the corporation, nor had any of them contributed any money toward its incorporation, nor had any of them any financial interest in any of Engels' activities.

Engels received a salary of \$50 a week from the respondent from September 13 to October 1, 1937, although it does not clearly appear what his duties were. Cardinale testified that Engels performed no work during this period but simply observed the manner in which the mechanics performed their work so that he could determine which of them he would retain when the corporation assumed the operation of the repair shop, and that Engels was placed on the payroll in order that he might be protected by workmen's compensation insurance, should he be injured during this period. Engels' testimony is no more elucidating. He stated that each day he performed a full day's work as a mechanic, but that this was not work which had been assigned to him as he was paid \$50 a week "to size up the men." It is also significant that Engels stated that, on October 2, 1937, the corporation took over all of the employees in the repair shop, including a mechanic hired by Cardinale on September 27, 1937, without consulting him, and that his salary of \$50 a week continued after October 2, 1937, except that he was paid by the corporation instead of the respondent.

Engels testified that the corporation was organized about August 11, 1937, by Morris Edelstein, a lawyer sharing offices with Jacob Friedland, the attorney for Local 560. He stated that he paid Edelstein \$100 in cash for his services and that he had received the money from his wife. Neither he nor his wife had a bank account. He stated that his wife had managed to save this \$100 from the money he had given her out of the salary of \$30 a week, which he received at his last position.

The corporation issued one hundred shares of no par value stock. Engels testified that one share had been issued to Bonnet, president of the corporation, and another to Van Horn, both of whom were admittedly dummies. The other 98 shares were supposed to be for Engels who, however, had not, as yet, received his stock certificate, which was still being retained by Edelstein.

The corporation maintained a bank account in the First National Bank of Whippany. Engels was very certain of the fact that the initial deposit was \$500 in cash, \$200 of which he received in cash from a friend, Pat McGuire, and \$300 of which he received, also in cash, from another friend, Charles Moeller. Pursuant to a stipulation entered into between counsel for the respondent and the Board at the hearing, certain documents, with reference to this initial

deposit, were later introduced into evidence as Board's Exhibit "C".

Engels testified that the corporation was securing all of the respondent's mechanical work and that, in the event that some of it could not be performed in the repair shop, the corporation intended to send it out of the shop to be performed by others, but that he had not found it necessary to send out any work up to the time of the hearing.

Shortly before the termination of the hearing Cardinale virtually conceded that the respondent continued to control the repair-shop work by blandly stating that he would hire Santa Maria and O'Connor "if they came in at any time."

Board's Exhibit "C" likewise demonstrates the falsity of the respondent's testimony. It consists, in part, of:

a. A deposit slip of the First National Bank of Whippany showing that on October 9, 1937, a \$500 check was deposited to the account of the corporation.

b. A photostatic copy of the respondent's check, dated October 8, 1937, signed by James G. Cardinale, as president, and Frank Cardinale, as secretary-treasurer, and drawn to the order of the corporation for \$500, and the endorsement of the check by the corporation for deposit in its account in the First National Bank of Whippany.

c. A copy of a resolution of the Board of Directors of the corporation, dated September 30, 1937, signed by Henry Bonnet, as secretary, authorizing the opening of the corporation's bank account in the First National Bank of Whippany, reciting, among other things, that Jacob Friedland is the president and Alfred A. Engels is the treasurer of the corporation.

d. Other documents showing that the \$500 check was deposited to the corporation's credit in its bank account and paid by the respondent's bank from its account.

The evidence also shows that at various periods between the date of the discharge of Henecke, Santa Maria, and O'Connor and this hearing the respondent hired one to four men to replace them in its repair shop.

D. Conclusions as to the unfair labor practice

The fact that Henecke was discharged the day after he had been initiated into membership in the Union would ordinarily be strong evidence that his Union activity motivated his discharge. This inference cannot be drawn here. In accepting the position of service manager, Henecke also assumed the responsibilities attendant upon that position as supervisor of all of the respondent's repair work and of the men employed in its repair shop. His irresponsible attitude toward his position, was evidenced by his latenesses on April 13 and

20, 1937, in connection with personal affairs which he misrepresented to the respondent. This was a sufficient, and in our judgment the actual, cause for his discharge.

We find, however, that O'Connor and Santa Maria, who were both discharged shortly after they became members of the Union, were not discharged for the reason advanced by Cardinale, namely, that the respondent did not need their services as it intended having more of the work performed outside of the repair shop. The evidence shows that the corporation was organized by the respondent and the arrangement with Engels entered into to hide the fact that the respondent continued to operate the repair shop itself; that from one to four men were hired by the respondent to replace these discharged men; that the corporation is the agent of the respondent; that the quantity of work performed for the respondent out of its repair shop did not differ materially either before or after April 22, 1937; and that the respondent is willing to rehire Santa Maria and O'Connor.

We find that August Santa Maria and Patrick O'Connor were discharged by the respondent for the reason that they had joined and assisted the Union.

We further find that, by reason of the said discharges, the respondent discouraged membership in the Union and interfered with, coerced, and restrained its employees in the exercise of their rights guaranteed by Section 7 of the Act.

Santa Maria and O'Connor have secured no other regular or substantially equivalent employment since their discharge.

IV. EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

As we have found that August Santa Maria and Patrick O'Connor were discharged by the respondent for the reason that they had joined and assisted the Union and because they had exercised the rights guaranteed to them by Section 7 of the Act, we shall order the respondent to offer to reinstate them to their former positions and to pay to each of them a sum of money, equal to that which he would have received as wages from the date of his discharge to the date of the Intermediate Report and from the date of this Order to the date

of such offer of reinstatement, less any amount which he has earned during said period. As we have previously held, we do not believe that the respondent could have been expected to reinstate the discharged employees after it received the Intermediate Report recommending the dismissal of the complaint, and therefore it should not be required to pay back pay from that time to the date of this decision.²

We shall also order the respondent to cease and desist from the unfair labor practices in which it has been engaged and we shall also order it to perform such affirmative acts as will give its employees free opportunity to exercise the rights guaranteed to them by Section 7 of the Act.

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. International Association of Machinists is a labor organization, within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of August Santa Maria and Patrick O'Connor, and thereby discouraging membership in International Association of Machinists, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

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

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

ORDER

Upon the basis of the findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Cardinale Trucking Corp., and its officers, agents, successors, and assigns shall:

1. Cease and desist:

(a) From in any 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

² See *Matter of E. R. Haffelanger Company, Inc.*, and *United Wall Paper Crafts of North America, Local No. 6*, 1 N. L. R. B. 760; *Matter of Brown Shoe Company, Inc., a Corporation and Boot and Shoe Workers' Union, Local No. 655*, 1 N. L. R. B. 803.

concerted activities for the purpose of collective bargaining and other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act;

(b) From in any manner discouraging membership in International Association of Machinists or any other labor organization of its employees by discriminating against its employees in regard to hire or tenure of employment or any term or condition of employment.

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

(a) Offer August Santa Maria and Patrick O'Connor immediate and full reinstatement to their former positions without prejudice to their seniority and other rights and privileges;

(b) Make whole August Santa Maria and Patrick O'Connor for any loss of pay they have suffered by reason of their discharge, by payment to each of them of a sum of money equal to that which he would normally have earned as wages from April 22, 1937, the date of his discharge, to August 16, 1937, and from the date of this Order to the date of such offer of reinstatement, less the amount which he has earned during said period;

(c) Immediately post notices in conspicuous places throughout its plant and maintain such notices for a period of thirty (30) consecutive days stating that the respondent will cease and desist as aforesaid;

(d) Notify the Regional Director for the Second Region in writing within ten (10) days from the date of this order what steps the respondent has taken to comply therewith.

And it is further ordered that the complaint be, and it is hereby, dismissed to the extent it concerns the discharge of Michael Henecke.