

In the Matter of ATLANTIC GREYHOUND CORPORATION and BROTHERHOOD OF RAILROAD TRAINMEN

Case No. C-440.—Decided June 27, 1938

Motorbus Transportation Industry—Employee: person in minor supervisory position as employee—*Interference, Restraint, and Coercion:* charges of, dismissed in part—*Discrimination:* discharge, for union membership and activity—*Reinstatement Ordered:* discharged employee—*Back Pay:* awarded discharged employee.

Mr. Reeves R. Hilton, for the Board.

Mr. I. M. Bailey and *Mr. Chesney M. Carney,* of Clarksburg, W. Va., for the respondent.

Mr. S. R. Harvey, for the Brotherhood.

Miss Carol Agger, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges duly filed by Brotherhood of Railroad Trainmen, herein called the Brotherhood, the National Labor Relations Board, herein called the Board, by the Regional Director for the Fifth Region (Baltimore, Maryland) issued its complaint dated November 27, 1937, against Atlantic Greyhound Corporation, Charleston, West Virginia, herein called the respondent, alleging that the respondent had engaged in 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. A copy of the complaint, accompanied by notice of hearing, was duly served upon the respondent and upon the Brotherhood.

The complaint alleged, so far as here material, that on or about June 15, 1937, the respondent discharged J. Lee, a dispatcher, whom it employed at its bus terminal station in Raleigh, North Carolina, because of his affiliation with and activities on behalf of the Brotherhood, thereby discriminating in regard to the tenure of employment

of said Lee and discouraging membership in said labor organization, that by said discharge the respondent interfered with, restrained, and coerced its employees in respect to rights secured them under Section 7 of the Act. The complaint further alleged, in paragraphs 9 and 10 thereof, that the respondent intimidated, restrained, and coerced its employees, and in other ways attempted, to prevent them from joining a labor organization of their own choosing.

The respondent duly filed an answer denying generally the averments of unfair labor practices charged in the complaint, and alleging affirmatively that on June 12, 1937, said Lee, acting in his capacity as dispatcher, assigned a driver to duty without reasonable rest and at a time when another driver was available; that in so doing Lee violated a safety regulation of the respondent; that on June 15, 1937, the respondent discharged Lee for said infraction of its regulation.

Pursuant to notice, a hearing on the complaint was held in Raleigh, North Carolina, on December 6 and 7, 1937, before D. Lacy McBryde, 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 introduce evidence bearing on the issues was afforded all parties.

At the commencement of the hearing, the respondent moved to dismiss paragraphs 9 and 10, above mentioned, of the complaint, and so much of paragraphs 11, 12, and 13 as related to paragraphs 9 and 10, for indefiniteness; and further moved for a bill of particulars on the same ground. The Trial Examiner thereupon ruled that counsel for the Board furnish the respondent with the requested particulars, and counsel for the Board passed to counsel for the respondent a certain paper, the contents of which do not appear. In view of the order hereinafter made, the Board finds it unnecessary to determine whether the ruling of the Trial Examiner and the procedure taken pursuant to it were prejudicial to the respondent. Generally, under the circumstances stated, the respondent would have been obliged, if it felt that the information given it was inadequate, to submit the matter of such inadequacy to the Trial Examiner for a ruling, before presenting such issue here.

The respondent also moved to dismiss the complaint on the ground that Lee was not an employee, within the meaning of Section 2 (3) of the Act. It contended that even were Lee's discharge deemed interference and discrimination in the sense in which those terms are used in Section 8 (1) and (3) of the Act, nevertheless no order could be based thereon because of the asserted want of statutory provision. The Trial Examiner overruled this motion, and for reasons hereinafter set forth his ruling is hereby affirmed.

During the course of the hearing, the Trial Examiner made various rulings on the admission and exclusion of evidence, to some of which rulings exceptions were taken. He also ruled on certain other motions. The Board has reviewed these rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On February 17, 1938, the Trial Examiner filed an Intermediate Report, copies of which were duly served on all parties, in which he found that the respondent had engaged in 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 Act, and recommended that the respondent cease and desist from its unfair labor practices, reinstate J. Lee, with back pay, to his former position as dispatcher, and take certain other action to remedy the situation brought about by the unfair labor practices. On February 25, 1938, the respondent filed Exceptions to the Intermediate Report, and requested oral argument before the Board.

Pursuant to notice duly served upon the respondent and the Brotherhood, a hearing for the purpose of oral argument on the Exceptions and on the record was held before the Board in Washington, D. C., on April 5, 1938. The respondent and the Brotherhood appeared and presented oral argument to the Board. The respondent filed a brief.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent is a corporation organized under the laws of Virginia, having its principal office in Charleston, West Virginia. It operates an interstate motorbus transportation system in the southeastern section of the country. It transports, for hire, passengers, baggage, mail, and express, in and through nine States and the District of Columbia, and has direct connections with about 108 other public motorbus lines, some of which are interstate carriers. The respondent maintains division offices and terminals in various cities through which its busses travel.

II. THE ORGANIZATION INVOLVED

Brotherhood of Railroad Trainmen is a labor organization admitting to membership, among others, employees engaged in the operation of public motorbuses and railroads, including bus drivers and bus dispatchers employed by the respondent.

III. THE UNFAIR LABOR PRACTICES

A. Background of the unfair labor practices

This proceeding is concerned only with events and occurrences centering about the division office and terminal of the respondent at Raleigh, North Carolina. Sometime in the spring of 1937 the Brotherhood commenced organizational work among the respondent's employees at Raleigh. Forty-two bus drivers, two regular dispatchers, and a relief dispatcher were then stationed there. J. Lee, one of the regular dispatchers, and several of the drivers joined the Brotherhood in May 1937, and others did so in June.

The organizing of its drivers was of concern to the respondent. On one occasion, the superintendent in charge of the district office and terminal, McAfee, in the presence of several drivers, told Murphy, a Brotherhood organizer then conducting organizational work at the terminal: "We [the respondent] can't talk to our men, Murphy, about this labor situation; but I can certain as Hell talk to you. If you would tell these men the truth down here, instead of lying to them, you couldn't get a member."

The hostile attitude which the respondent entertained towards the drivers joining the Brotherhood manifested itself in other ways. On May 14 and thereafter, one Tunstall, a bus driver for the respondent in South Carolina, came to Raleigh and spent a number of days with the drivers attempting to persuade those who had already applied for membership in the Brotherhood to sign a letter, which he carried, addressed to the president of the Brotherhood and stating that the undersigned had decided to withdraw their applications for membership "as we feel that your organization has nothing whatever to offer us." Tunstall stayed in the terminal, meeting the drivers as they came in and attempting to secure their signatures to the letter. His activities were known to the respondent. Tunstall told Lee that the Brotherhood was a railroad organization and that it would not benefit bus drivers. No one attempted to prevent Tunstall from carrying on this solicitation of signatures on the respondent's property during working hours, although, as hereinafter set forth, the respondent took steps, particularly in regard to Lee, to prevent Murphy from engaging in his activities on behalf of the Brotherhood.

At about the same time, the relief dispatcher, Powell, called one of the drivers into his office and, having ascertained that the driver favored the Brotherhood, told him that he was wrong in believing that the Brotherhood was a good labor organization. The driver, one Upchurch, asked why he was wrong and Powell replied: "Well, you know there is more than one way to skin a cat. You fellows are getting pretty old now and you won't be able to stand the exam-

inations [physical examinations]; the company can let you go for that." Powell then handed Upchurch the letter addressed to the president of the Brotherhood, saying: "Here is a paper that Tunstall is getting up," and asked Upchurch whether he would not sign it. Upchurch replied that he would not and stated that the "Government" gave him "the right to join any union" he wanted to, and that he was "going to take that right." Powell then said: "Well, Shorty, I am sorry. I am your friend." In view of the respondent's knowledge of Tunstall's activities, we entertain no doubt that it likewise had knowledge of the assistance which Powell was giving Tunstall. The record does not show that the respondent reprimanded or otherwise sought to prevent Powell from carrying on such activities during working hours on its property. This is in marked contrast to what the evidence discloses as discussed below, concerning action taken by the respondent in relation to Lee.

The proof fails to establish that the above-mentioned activity of Tunstall or the statements of Powell occurred at the instance of the respondent. While there is basis for a strong suspicion that Tunstall's solicitation of signatures and Powell's assistance in that regard were with the consent, if not at the direction of the respondent, we cannot so find on the record before us. Accordingly, we are unable to find any unfair labor practice in that regard. However, the attitude of the respondent towards the Brotherhood as expressed by McAfee, and the respondent's failure to act with respect to Tunstall's and Powell's attempts to secure resignations from the Brotherhood, as compared with its action towards Murphy and Lee who wanted the Brotherhood to endure, are matters of importance tending to explain the conduct of the respondent and other occurrences in relation to Lee, hereinafter set forth. Inasmuch as there remains for consideration only the discharge of Lee, we will dismiss from the complaint the allegations of paragraphs 9 and 10, and that part of paragraphs 11, 12, and 13 relating to said paragraphs 9 and 10.

B. *The discharge*

J. Lee had been one of the dispatchers employed by the respondent in its Raleigh terminal since about 1934. As above stated, the respondent employs at the terminal two regular and one relief dispatcher. It is their duty, among other things, to assign drivers to extra runs and make certain that the busses leave on schedule. The dispatchers work in the terminal, meeting the drivers on their return from or as they leave on runs. Lee's work brought him into contact with a large number of the drivers.

Lee joined the Brotherhood in May 1937 and shortly thereafter became a member of its organizing committee at Raleigh. He was active in soliciting members for the Brotherhood among the drivers.

Soon after Lee joined the Brotherhood, he was approached by McAfee, the division superintendent, who asked Lee what "good" the Brotherhood could "do to bus drivers" since it was a "railroad organization." Lee testified that McAfee told him, "You know as well as anybody knows that the railroads today are our greatest competitors, and what the Brotherhood wants to do is to get all the bus drivers into one organization and then call a big strike, [so that] . . . they might send the business the railroads' way." Lee further testified that McAfee repeated the substance of this remark to him at a later date. McAfee denied at the hearing that he had discussed the Brotherhood with Lee. Since McAfee did not deny that this was his belief, and since, at the hearing, he admitted making a somewhat similar statement to Murphy, the organizer for the Brotherhood, in the presence of a number of persons, we are inclined to believe that he had so expressed his opinion to Lee and so find.

In the early part of June 1937 McAfee observed Murphy, the organizer, talking to Lee at the terminal. McAfee then asked Lee whether or not he had been talking to Murphy, and upon Lee replying that he had, McAfee said, "I don't want you talking to him, and furthermore than that I want you to keep him away from around here." Lee testified that McAfee then threatened him, saying that if he, Lee, did not think that he was "man enough" to keep Murphy away from there, he, McAfee, "would put somebody up around here that will." McAfee testified that he had seen Lee and Murphy together on only one occasion and that, in the dispatcher's office; that the following day he told Lee not to allow labor organizers in the dispatcher's office and asked Lee what Murphy had been doing there; and that Lee had replied that they had not been discussing the Brotherhood. McAfee could not remember saying anything else. In view of the marked aversion which McAfee had shown for Murphy on other occasions, as well as McAfee's views on the Brotherhood, we are satisfied with Lee's version and find that McAfee did threaten Lee with loss of position.

On Saturday, June 12, at 6:55 in the evening, Lee ordered one Zettlemaer, a driver employed by the respondent, to make the 11:15 run that night from Raleigh to Richmond. Zettlemaer had already driven one round trip to Richmond that day. Zettlemaer was one of the extra drivers (those not assigned to regular runs) and was used by the respondent principally during week ends and other periods of unusually heavy travel and paid according to the hours spent on duty. No other driver was available at the time Zettlemaer was assigned to the trip and none would have been available at 11:15 except one Lefler, another relief driver, who was then out on a run of several hours and was not scheduled to return until about 11:00 p. m., 15 minutes before the Richmond trip was to begin.

Lefler returned from his run at 11 p. m. and upon being told that he would not be needed further, left for the night. Zettlemaer drove the 11:15 bus to Richmond where he arrived at 3:50 a. m. and left Richmond at 7:30 the following morning to return to Raleigh. When Williams, the other regular dispatcher, came on duty about 9 o'clock on the morning of June 13 he found upon examining the dispatch sheet that Zettlemaer had made the 11:15 run. Williams then had a telephone conversation with McAfee. McAfee told him to communicate with the terminal at Richmond and order Zettlemaer not to make the return trip. Zettlemaer had already left Richmond, however, and upon orders from Raleigh was relieved a short distance from Raleigh at 11:10 a. m. At the time Zettlemaer was relieved, he was "deadheading" the bus, that is bringing the bus back without passengers. It does not appear whether or not Zettlemaer had driven any passengers for any part of the return trip on Sunday morning.

The respondent claims that a rule of the respondent governing the driving and rest hours of drivers was in effect on June 12 and had been in effect some months prior thereto. The rule was not in writing nor was it required by Federal law.¹ The specific words of the rule, if there was such a rule, do not appear from the record but its purported substance was stated by McAfee, as follows: "It is a rule not to use any man after he has made his regular run, except in extreme cases of emergency, and then only to the extent where he would be safe, after having proper rest." McAfee further stated that 8 hours was considered sufficient rest and defined an emergency as a situation in which "it would be necessary to double a run and you didn't have an extra man to take it."

On October 12, 1936, a letter was sent from the respondent's main office to all of the Division Superintendents, drawing their attention to the fact that the drivers were not being given sufficient rest; on December 9, 1936, a telegram was sent to McAfee reprimanding him for working the drivers for long hours; on December 22, 1936, a letter was sent to McAfee listing seven instances in which drivers had not had sufficient hours of rest; and on May 13, 1937, a similar letter listing two such instances was sent. We find that the respondent had instituted a policy of an indefinite character looking toward giving the drivers adequate rest after they had been driving a number of hours. The policy does not define the exact number of hours a driver may drive prior to receiving sufficient rest. The

¹The Interstate Commerce Commission issued regulations governing hours of service on December 29, 1937, to become effective July 1, 1938. The Hours of Service Regulations effective July 1, 1938 limit a bus driver's hours of duty to 15 hours in any period of 24 consecutive hours with a total of 60 hours a week and limit actual driving time to 12 hours in any period of 24 consecutive hours.

instances of long hours without rest, listed in the letters above referred to, all exceeded 11 hours of driving, and would indicate that a driver who had driven for more than 11 hours was entitled to about 8 hours rest. We further find, as McAfee testified, that the rule, if any, was not enforced in the Raleigh Division until the "summer" of 1937.

On June 15, 1937, McAfee called Lee to his office and informed him that he could no longer take responsibility for Lee's actions; that because of Lee's violation of the rule in sending Zettlemaer on a trip to Richmond at 11:15 in the evening after Zettlemaer already had driven one round trip to Richmond that day, McAfee would have to discharge him. McAfee asked Lee why he had sent Zettlemaer instead of Lefler. McAfee testified that Lee had replied "I just don't know, . . . I just didn't think." McAfee's version of the interview was corroborated by Williams, the other dispatcher, who stated that he was present. Lee testified that he told McAfee that he had sent Zettlemaer because Lefler had not had any rest. Lee had seen Lefler leave on one trip at about 4 o'clock in the afternoon, on a second trip at about 6 o'clock in the evening, and had observed him return from that trip at 11 in the evening. Lee knew that Lefler had not had any rest and could not have had any before leaving on the 11:15 run to Richmond. In view of these circumstances, and on the record, we are satisfied and find that Lee did not tell McAfee that he did not know why he had sent Zettlemaer rather than Lefler on the trip to Richmond.

At the outset we are met with the question, which the respondent by its motion has raised, whether Lee was an employee, as that term is defined in Section 2 (3) of the Act. Lee's position as dispatcher, heretofore described, was of a minor supervisory character. Although antiunion conduct of managerial or supervisory employees has been repeatedly held to be proof that the employer has engaged in unfair labor practices, it does not follow that managerial or supervisory employees are not employees within the meaning of Section 2 (3) of the Act.² The statutory definition is of wide comprehension. We find that Lee was an employee within the meaning of Section 2 (3) of the Act.

In the light of the entire record, we are convinced that the respondent found Lee's membership in and activity on behalf of the Brotherhood especially objectionable, that its hostility towards the Brotherhood led it to determine to rid itself of Lee, and that the Zettlemaer incident afforded and constituted a pretext which it uti-

² Cf. *Matter of Rex Manufacturing Co., Inc. and A. F. of L. Federal Local Union No. 20893*, 7 N. L. R. B. 95

lized for such purpose. The attitude of the respondent towards the organization of its employees in the Brotherhood has been adequately indicated in the discussion above and need not be repeated. The same attitude evidenced itself against Lee, as shown in the unnecessarily strong and threatening language which McAfee used towards him upon the occasion of his seeing Lee talking to the Brotherhood organizer. Lee's discharge was about 2 weeks after this incident. It should be noted that Lee's position as dispatcher allowed him to know and come into frequent contact with all of the drivers. Since the drivers were constantly coming in and out of the terminal, it would have been difficult for any of them to have solicited membership throughout the entire group. Tunstall carried on his activities in the terminal. It is our opinion that Lee's strategic position strongly moved the respondent in its decision to single him out for discharge.

Nor have we any doubt that the respondent was aware of Lee's affiliation with, and activity in soliciting members in behalf of, the Brotherhood. The organizational campaign carried on caused great interest and discussion among the drivers at the terminal and McAfee himself admitted at the hearing that he talked with a number of the men about the Brotherhood. In at least two instances McAfee took occasion to tell Lee of his opinion that the Brotherhood intended to induce the bus drivers to strike in order to divert business to the railroads. Lee testified that he thought that McAfee knew he was a member and McAfee did not deny that he knew Lee had joined the Brotherhood.

The contentions of the respondent that Lee's assignment of Zettlemaer to the 11:15 run was the active cause of Lee's discharge, is not, as we have said, persuasive. The record discloses that there were a number of violations of the alleged rule, both before and after June 15, 1937, for which no dispatcher was discharged. The letters from the main office to McAfee, dated December 22, 1936, and May 13, 1937, listed nine instances of assignments of drivers which that office deemed counter to the respondent's policy, for which no dispatcher was discharged. The so-called rule was not enforced in Raleigh until the summer of 1937. In May or June 1937, one Nolan, a driver, drove for more than 25 hours with only 2 hours and 10 minutes' rest. Another driver, Shore, during the fall of 1937 drove for almost 13 hours with only 1 hour of rest. The dispatchers responsible for these violations of the rule were not dismissed and at the time of the hearing no dispatcher other than Lee had ever been discharged for that reason.

The respondent's claim that Lefler rather than Zettlemaer should have been sent to Richmond on the night of June 12 is based upon the fact that at 11 p. m. Lefler had driven only 6 hours and 45

minutes that day whereas Zettlemaer had driven 9 hours and 35 minutes. However, Lefler had had practically no rest during that period, while Zettlemaer, in addition to almost 2 hours' rest at noon, had been free for over 4 hours just prior to starting out. Lee stated at the hearing that he had sent Zettlemaer because Lefler had had no rest. Zettlemaer had come into the terminal at 6:55 p. m. and it was then that Lee made arrangements with him to drive the 11:15 bus. At that time, and until Lefler's return, Lee could not have been certain that Lefler would return in time to take the 11:15 run. Lefler in fact returned at 11 o'clock. In sending Zettlemaer on the Richmond trip, Lee was acting in accordance with an established practice followed by the respondent's dispatchers, that of sending the first extra driver in, on the next extra trip. In view of these considerations, it by no means is even clear that Lee erred in sending Zettlemaer rather than Lefler. The respondent further contends that it was improper to allow either driver to make the return from Richmond on the morning of June 13, 1937. Since the record does not show that there was a driver available to return the bus from Richmond to Raleigh on that morning, we cannot accord any weight to this contention.

The respondent in its answer and in the oral argument advanced three additional reasons why Lee was an undesirable employee: he had not paid a long overdue rent bill concerning which the creditor was bothering the respondent; he had asked a driver to endorse his promissory note; his eyesight was poor because of blindness in one eye. In view of the fact that the respondent does not contend that these factors were in any way responsible for the discharge, we do not find it necessary to discuss them.

Lee has not been employed since his discharge. During the time he was employed by the respondent he earned \$132.30 a month.

We sustain the conclusion of the Trial Examiner and find that the respondent discharged J. Lee on June 15, 1937, because he joined and assisted the Brotherhood, thereby discriminating in regard to his hire and tenure of employment, and interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the respondent set forth in Section III above, occurring in connection with the business 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.

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

CONCLUSIONS OF LAW

1. Brotherhood of Railroad Trainmen is a labor organization, within the meaning of Section 2 (5) of the Act.

2. J. Lee, at the time of his discharge, and for some time prior thereto, was an employee, within the meaning of Section 2 (3) of the Act.

3. The respondent, by discriminating in regard to hire and tenure of employment of J. Lee, and thereby discouraging membership in the Brotherhood, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

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

5. The aforesaid unfair 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 above 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, Atlantic Greyhound Corporation, a corporation, and its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in the Brotherhood, or any other labor organization of its employees, by discriminating in regard to hire or tenure of employment or any term or condition of employment because of membership in or activity in behalf of the Brotherhood or any other labor organization of its employees;

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, and to engage in concerted activities for their mutual aid or protection, as guaranteed in Section 7 of the Act.

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

(a) Offer immediate and full reinstatement to J. Lee to the position in which he was employed on June 15, 1937, as dispatcher, without prejudice to his seniority rights and other rights and privileges;

and make said Lee whole for any loss he may have suffered by reason of the discrimination of the respondent in discharging him on June 15, 1937, by paying to him a sum equal to that which he normally would have earned as wages during the period from June 15, 1937, until the date of the offer of reinstatement, less the amount, if any, which he may have earned during said period;

(b) Post immediately, and keep posted for a period of at least thirty (30) consecutive days from the date of posting, notices to its employees in conspicuous places in all of its division offices, terminals, and garages, including those in Raleigh, North Carolina, stating that it will cease and desist in the manner set forth in 1 (a) and (b), and that it will take the affirmative action set forth in 2 (a), of this order;

(c) Notify the Regional Director for the Fifth Region in writing within ten (10) days from the date of this order what steps it has taken to comply herewith.

And, it is further ordered that the allegations of paragraphs 9 and 10 of the complaint, and so much of paragraphs 11, 12, and 13 as relate thereto, be, and they hereby are, dismissed from the complaint.