

Rowe Industries, Inc. and Building Service Employees Union, Local No. 307, Building Service Employees International Union, AFL-CIO and Harlan C. Jackson and James W. North and Betty Wilcox. *Cases Nos. 29-CA-53,¹ 29-CA-53-2, 29-CA-53-3, and 29-CA-53-4. April 23, 1965*

DECISION AND ORDER

On February 16, 1965, Trial Examiner Louis Libbin issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision with a supporting brief. The Respondent filed no exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision, the exceptions, and brief, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

ORDER

Pursuant to Section 10(c) of the Act, the Board hereby adopts as its Order the Order recommended by the Trial Examiner, and orders that the Respondent, Rowe Industries, Inc., Sag Harbor, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.²

¹ Designated in the complaint as Cases Nos. 2-CA-10038, 2-CA-10038-2, 2-CA-10038-3, and 2-CA-10038-4.

² The telephone number for Region 29, as given in the notice attached to the Trial Examiner's Decision, is amended to read: Telephone No. 596-5386.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon charges filed on May 26, 1964, by Building Service Employees Union, Local No. 307, Building Service Employees International Union, AFL-CIO, herein called the Union, on June 24, 1964, by Harlan C. Jackson and James W. North, individuals, and on July 6, 1964, by Betty Wilcox, an individual, the General Counsel of the National Labor Relations Board by the Regional Director for Region 2 (New York,

New York), issued his consolidated complaint, dated September 22, 1964, against Rowe Industries, Inc., herein called the Respondent. With respect to the unfair labor practices, the complaint alleges, in substance, that: (1) Respondent on specified dates discharged and thereafter refused to reinstate employees Harlan C. Jackson and James W. North because they engaged in union and concerted activities; (2) certain named agents and supervisors of Respondent engaged in specified acts of interference, restraint, and coercion; and (3) by the foregoing conduct Respondent violated Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. In its duly filed answer, the Respondent admitted certain allegations and denied all unfair labor practice allegations.

Pursuant to due notice, a hearing was held before Trial Examiner Louis Libbin at Riverhead, New York, on November 16 and 17, 1964. All parties appeared, were represented at the hearing, and were given full opportunity to examine and cross-examine witnesses, to introduce relevant evidence, and to file briefs. On December 28, 1964, the General Counsel filed a brief, which I have fully considered. For the reasons hereinafter indicated, I find that Respondent has violated Section 8(a)(1) and (3) of the Act.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, Rowe Industries, Inc., a New York corporation, maintains a plant at Sag Harbor, New York, where it is engaged in the manufacture and sale of electric motors and related products. During the year preceding the issuance of the complaint, a representative period of its annual operations, Respondent manufactured and shipped products, valued in excess of \$50,000, from its Sag Harbor plant to points located outside the State of New York.

Upon the above admitted facts, I find, as Respondent admits in its answer, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, the record shows, and I find, that Building Service Employees Union, Local No. 307, Building Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Introduction; the issues*

As previously noted, Respondent's plant is located on Sag Harbor Turnpike in Sag Harbor, New York. Although a member of the New York bar, Respondent's president, Robert Rowe, is not engaged in the practice of law but devotes his time to the operation of the factory where he maintains a plant office. All department heads, including David Lee, Eugene Rhodes, and Murray McLaughlin, are admittedly supervisors within the meaning of the Act.

The Union began an organizing campaign among Respondent's employees in early April 1964 and made daily handbill distributions to employees as they exited to their cars from Respondent's driveway onto the turnpike. The Union also maintained an office on the turnpike, located a short distance from the plant. Harlan Jackson and James North, union protagonists, were discharged on May 1 and 15, 1964, respectively. Respondent avers that they were discharged "for conducting union organizational activities on company property on working hours." On May 19, 1964, the Board conducted an election in which the Union received a minority of the votes.

The principal issues litigated in this proceeding are (1) whether prior to the election President Rowe and Supervisors Lee, Rhodes, and McLaughlin engaged in conduct violative of Section 8(a)(1) of the Act, such as surveillance, interrogation, urging the creation of an inside union, promulgating, and enforcing an invalid no-solicitation rule, threats of discharges and other reprisals for supporting the Union, and promises and grants of benefits to induce the employees to repudiate the Union; (2) whether the Respondent was liable for the antiunion activities of Frederick Davis; and (3) whether the discharges of Jackson and North were violative of Section 8(a)(1) and (3) of the Act.

B. Interference, restraint, and coercion

1. Surveillance and attempted surveillance

a. As employees were leaving the premises

On Monday, May 15, 1964, a few working days before the Board election, Supervisor Lee appeared about 5 p.m. when Union Representative Faust was handing out campaign literature as Respondent's Sag Harbor driveway was emptying into the turnpike. Without himself stopping any cars, Faust was standing on the public highway and offering the literature to whichever employees would accept them. As this was a main highway where the speed limit was 50 miles an hour and as a majority of the cars leaving the driveway had to make a left turn and therefore had to give the right-of-way to automobiles coming from either direction, the automobiles normally could not exit from the driveway at any rapid rate of speed so that it was not difficult for Faust to offer the union literature. Lee came over and stood on Respondent's premises, close to the highway. He began motioning employees' cars to exit quickly onto the highway. He also told one of the uniformed guards at Respondent to stand on the highway itself and hold up traffic, so as to get the cars of Respondent's employees to exit rapidly upon the highway. Lee remained there about 20 minutes, observing the cars so that he could see which of the employees were accepting the union literature. During that time, Lee also said to Faust, "if you come on over here, I will show you that I am a better man than you are."

A few days later, but still before the election, Supervisor Lee again appeared while Faust was distributing literature to employees exiting from Respondent's driveway. Lee again motioned employees' cars in an attempt to have them exit quickly upon the highway. He remained there for about 20 or 25 minutes and again could see which cars were accepting the union literature. At one point during that period, President Rowe was standing about 10 feet behind Lee. On that occasion, Lee said in a loud voice, which could be heard by Faust on the highway, that the union "fellows" were the same ones "who have been here and don't they get tired and why don't they go home."

The foregoing findings are based on the credited testimony of Faust and James North. Lee was the only witness for Respondent on the foregoing incidents. When asked by Respondent's counsel if he made the statement attributed to him by Faust and North on the first occasion, Lee testified, "I doubt it very much." Lee admitted that on one occasion he speeded up the exiting cars but contended that he did so because a workman had been injured and had to be rushed to the hospital. Respondent offered no corroboration of this alleged accident. Lee did not impress me as a credible witness. Neither the guard nor President Rowe were called to corroborate Lee's testimony. Nor did Lee explain his problem to Faust on that occasion, as would normally be expected if an accident had in fact occurred. I do not credit Lee's testimony to the extent that it conflicts with the previous findings.

I find that Lee was present on both occasions for the purpose of observing which employees were accepting the union literature, to impede the distribution, and to interfere with, restrain, and coerce the employees in the exercise of their protected rights in this regard. Such conduct, particularly in the light of Lee's threatening and hostile statements on those occasions, constituted acts of surveillance which are violative of Section 8(a) (1) of the Act.¹

b. The Union's office

The Union had also established an office right on the main turnpike, located at a distance estimated to be 5 to 7 city blocks from Respondent's plant. Although set back about 25 feet from the road, there were no obstructions between the road and the office. During the union campaign before the election, Supervisors Lee and McLaughlin drove by the office during the lunch period about 15 to 20 miles an hour, although most cars go by at least at the speed limit of 50 miles an hour. As they drove by, they observed the Union's office and its activities and waved back when they were waved to by those at the office.

The foregoing findings are based on the credited testimony of Faust and Harlan Jackson. McLaughlin did not deny having engaged in such conduct. Lee admitted that he drove past the Union's office slowly. He testified that he does not believe in driving fast because it is a hazardous highway, and that he looks from side to side when he drives and observes any buildings that happen to be there. As previously

¹ See, e.g., *Champa Linen Service Company*, 140 NLRB 1207; *Dandridge Finishing Company, Inc.*, 142 NLRB 1141, 1142-1143.

indicated, I do not regard Lee as a credible witness. His explanation for driving by the Union's office on the occasion when Respondent's employees were likely to be present does not stand up. For if the highway was so hazardous that he had to drive at a low speed, the same hazards would also require that he keep his eyes on the road and not on buildings located 25 feet from the road.

I find that Supervisors McLaughlin and Lee drove by the Union's office for the purpose of observing any employees or employees' automobiles on the premises. By such acts of surveillance, Respondent further violated Section 8(a)(1) of the Act.

c. Employees on plant premises

Supervisor McLaughlin admitted that he instructed the guards under his control to report to him any activities that went on at night in the factory, that he was referring to union activities as one of the things he wanted to know about, and that the guards understood his instructions to include union activities by anyone at the plant.

Obviously without merit is Respondent's assertion in its answer that it is both necessary and proper to "observe all activities of employees" at the plant, including union activities. As McLaughlin's instructions to the guards were not limited to times or areas which Respondent could lawfully proscribe, and as in fact there was no plant rule at that time against union activities at all, I find that McLaughlin thereby sought to keep under surveillance the protected activities of its employees. By such conduct, Respondent further violated Section 8(a)(1) of the Act.

2. Interrogation

About April 15 or 20, 1964, Department Head Eugene Rhodes approached employee Jackson while the latter was working in the degreasing room, and asked Jackson what he thought of the Union, which was then conducting an organizing campaign among Respondent's employees. Jackson replied that he was about to ask Rhodes the same question. At that time Jackson had not yet signed a union card. Rhodes replied that although he had been a shop steward in a maritime union he still did not like unions. Rhodes then suggested that Jackson should see what he could do about forming an inside union. Rhodes was Jackson's department head.²

During April, but prior to April 30, employee Ila Allen had a brief discussion about the Union with Jackson during Allen's authorized coffee break, during which she asked Jackson about benefits to be obtained from joining the Union. Immediately after the conversation which lasted only a few minutes, and while she was still on her coffee break, Department Head or Supervisor Lee came over and asked her if she and Jackson had discussed the Union. When she replied in the affirmative, Lee stated that the employees were not permitted to talk about the Union and told her to go back to work. The next evening, her own department head, Eugene Rhodes, asked Allen if she and Jackson had discussed the Union. When she replied in the affirmative, Rhodes stated that she was not supposed to be discussing the Union, even though Rhodes knew that Allen was on her authorized coffee break at the time.³

I find that the foregoing interrogations of employee Jackson by Supervisor Lee and of employee Allen by Supervisors Lee and Rhodes, in the context and under the circumstances previously described and in the light of Respondent's other unfair labor practices herein found, constituted unlawful interrogation proscribed by Section 8(a)(1) of the Act.

3. Urging and suggesting formation of inside union

As previously noted, in April Department Head Rhodes approached employee Jackson at his work, questioned him as to what he thought about the Union, and expressed his own dislike of unions. Rhodes then asked Jackson what he thought about trying to organize a shop union of their own. When Jackson replied that he did not know anything about it, Rhodes suggested that Jackson talk to an employee named Ronny and see what they could work out.

²The findings in this paragraph are based on the credited testimony of Jackson. Rhodes admitted that he had a conversation with Jackson about unions but testified that "I don't believe I instituted it." Rhodes did not impress me as a credible witness and I do not credit his testimony to the extent that it may be regarded as a denial of Jackson's testimony.

³The findings in this paragraph are based on the credited testimony of Ila Allen. Lee did not deny having engaged in the interrogation. Rhodes did make such a denial. I do not credit his denial.

The next day Ronny approached Jackson to discuss the possibility of organizing a shop union of their own. A few days later Rhodes again approached Jackson in the degreasing room to find out what progress Jackson had made about the shop union. Jackson replied that he had spoken to Ronny about it. Rhodes pointed out that in a shop union of their own they could do anything they wanted with the dues.⁴

Respondent contends that, as President Rowe's name was not used in connection with Rhodes' suggestion for the formation of an inside union, Rhodes was merely expressing his own personal opinion for which Respondent was not liable. There is no evidence that Rhodes spoke in any other than his capacity as Respondent's supervisor or that Jackson had any reason to believe otherwise. Rhodes was Jackson's department head at that time. I find no merit in Respondent's contention. Nor can Respondent avoid liability for Rhodes' statements on the ground that it had instructed its supervisors not to discuss unions during the Union's campaign, as the record clearly demonstrates that the employees were not made aware of these instructions.⁵

I find that Rhodes' conduct in suggesting to and urging Jackson to take steps to form an inside union, and in pointing out its advantages while indicating his dislike of outside unions, was an attempt to induce the employees to reject and withhold their support from the Union which was then conducting an organizing campaign and was, under all the circumstances, violative of Section 8(a)(1) of the Act.⁶

4. Invalid no-solicitation and no-distribution rule

The undisputed and admitted evidence shows that until April 30, 1964, Respondent had never announced or publicized to its employees any rule of any kind against union solicitation or distribution of materials on Respondent's premises. However, on April 30 President Rowe had all the employees assembled during working time and made a speech during which he announced, among other things, a rule forbidding any union activities in the factory, on penalty of discharge for violating the rule.

As this rule was sufficiently broad to prohibit union solicitation on the premises during nonworking time, including break and lunch period,⁷ and to prohibit distribution of union literature in nonworking areas during nonworking time, it was clearly invalid and violative of Section 8(a)(1) of the Act.⁸

Moreover, I am convinced and find that the rule was discriminatorily motivated. Thus, the rule was orally announced immediately after a date for a Board election was agreed upon, and the prohibition extended only to union activities. The record does not support President Rowe's assertion in his speech that some employees were being annoyed and threatened by union solicitors. On the other hand, the record does show that employees were permitted to discuss other personal matters while at work. Indeed, employees were even permitted to engage in antiunion activities on company premises, without being penalized or disciplined therefore; while, as hereinafter found, two employees were discharged for allegedly violating the rule. I find that the rule was not promulgated in furtherance of any of Respondent's legitimate interests of serving production, order, and discipline, but specifically for the purpose of impeding and defeating union organization. Therefore, for this reason also, the rule violated Section 8(a)(1) of the Act.⁹

⁴ The foregoing findings are based on the credited testimony of Jackson. Rhodes admitted having one conversation with Jackson about the subject of "company unions" but denied that he was the one who suggested it. At another point he testified that he did not know whether it was he or Jackson who mentioned that the employees might be interested in it. However, Respondent's answer admits that Rhodes was the one who "mentioned the possibility that the employees might prefer a union whose membership was confined to employee" of Respondent. Rhodes further testified that he "doubted" that he told Jackson to talk to Ronny but admitted that there was an employee whose first name was Ronny and who had mentioned "about a company union" in Rhodes' presence. Rhodes further admitted that he had been a shop steward in a maritime union, as Jackson testified Rhodes had told him. I have previously found Rhodes not to be a credible witness. Under all the circumstances, I do not credit Rhodes' testimony to the extent that it constitutes a denial of the findings set forth in the text.

⁵ See, e.g., *H. J. Heinz Company v NLRB.*, 311 U.S. 514, 521.

⁶ See, e.g., *Brown Transport Corp.*, 140 NLRB 954, 955, 956.

⁷ President Rowe admittedly interpreted "working hours" and "company time" to refer to the period from the time of clocking in to the time of clocking out.

⁸ *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615; *Higgins Industries, Inc.*, 150 NLRB 106.

⁹ *The Wm. H. Block Company*, 150 NLRB 341.

5. Threats of reprisals and offer of benefits

a. *By President Rowe*

In the presence of Respondent's admitted supervisors, President Rowe addressed all plant employees who were assembled for that purpose about one-half hour before quitting time on April 30 and May 15, 1964. Tape recordings of these speeches were played at the instant hearings and transcribed by the official reporter by agreement of all parties.

(1) The April 30 speech

Rowe opened his talk by referring to the Union's efforts to organize the plant, and stated that "under the laws of this country you all have a right to join a union of your own choosing if you want to." He then pointed out that Respondent has never had a union in its plant in its approximately 15 years of existence and that—

Our business has been developed to some degree on this basis—our customers very frequently have asked us whether we have a union in our plant. They ask us this question because we are to virtually all our customers a single source of supply. This means that they cannot buy these motors that we make for them from anyone else. They buy them all from us.

Rowe then warned—

If this factory becomes a union factory, our customers will of course know this, and whether we will be able to retain the amount of business that we now have is in question, because . . . they have a right to say to me "Mr. Rowe, since you are now subject to possible shutdowns for labor conditions in your plant, we on our behalf can no longer have you as a single source of supply. We will have to buy some of our motors from other people in order to protect our supply lines."

Rowe then pointed out—

So that I want you clearly to understand this because this becomes a factor of your decision about unionizing this plant. You will be faced with the possibility that our activities here may be seriously limited because of this, because of this factor of the matter of our being a single source of supply.

Rowe then announced for the first time a prohibition against engaging in "any union activities in this factory." He stated:

You can do under the law anything you want to outside and off the property, but you are not under the law allowed to do anything in this factory, and that this is a valid reason to dismiss you immediately.

Rowe then pointed out that after the plant had been burned in February 1963 Respondent, was faced with a decision as to whether to move its facilities. He stated—

We made a decision that we would keep our home activities in Sag Harbor so long as we could do this. If the activity in the operation of this plant becomes difficult or if it makes it impossible to meet our customers' requirements, we will again have to reconsider whether we should move some sections or some of our production facilities outside of Sag Harbor. I want you all to know this because these are things that you have to know because they affect your jobs.

Rowe then proceeded to explain an incentive bonus plan which was in the process of being put into effect and which he pointed out could increase an employee's wages about \$15 or \$20 a week.

(2) The May 15 speech

About 4:30 p.m. on May 15, just 1 workday before the Board election, President Rowe again addressed the assembled employees. He opened his talk by informing the employees that this would be his last opportunity to talk to them before the union election, and explained the procedure of the voting and the ballot. He then pointed out that the incentive plan has already been put into effect "to some degree in most all the departments now and we are putting it in as fast as it is humanly possible to do it." He explained the reasons for some of the delays, and asked for the employees' indulgence. He then returned to the election and explained about the observers, pointing out further details about the voting. He urged all eligible employees to be sure to vote because—

. . . a lot of you may say "Oh, hell, I don't want the Union, I am not going to go in there and vote for them, and when you don't vote for them you might in

effect, by the fact that you don't vote for them, the net effect might be that you might have helped them that way.

He asked the employees again—

. . . to consider very seriously the consequences of what happens to this factory if we get a union in here, and I don't mention these things because I want to threaten you. I just want you to have your jobs here, and damit . . . if anybody tells you that this will not affect our business and that we will not be able to do anything . . . they are kidding you along because this is absolutely not true. We face very seriously losing a substantial part—our business has not been growing, by the way, as you know. Our schedules have been going down and we face further cuts. I would imagine that if the word gets around to our customers that we are unionizing in this plant, they are going to start scurrying around right quick to start finding cover for themselves, and it's going to mean probably further cuts.

He pointed out that if they should get busy again, they have to operate the plant with a freedom from labor problems in order to get the motors out. He then returned again to tell them that if Respondent's plant were to shut down because of labor problems, their customers would not stay with them very long and that there would be no jobs without customers.

(3) Conclusions

The major theme emphasized in the speeches is that Respondent's business has been developed on the basis that it has never been unionized; that labor problems and possible shutdowns are inevitable with the selection of a union; that if Respondent became a union plant, customers would readily learn about it and would quickly curtail their orders because of the possibility of shutdowns due to labor conditions; that this would result in less available work and the possible transfer of some of its operations; and that the selection of the Union would therefore bring about the loss or curtailment of the employees' jobs. As there is no evidence as to the truth of Rowe's statements concerning the alleged customer conduct with respect to a unionized plant or any evidence as to the basis for Rowe's belief in its truth, Rowe's warnings may not be regarded as mere predictions of possible future actions by third parties, privileged under Section 8(c) of the Act.¹⁰ I find that Rowe's statements constituted unlawful threats and warnings of loss of jobs in the event the employees selected the Union as their bargaining representative.¹¹ Nor was the existence of these threats and warnings mitigated by Rowe's statements that "I don't mention these things because I want to threaten you" and that "you all have a right to join a union of your own choosing if you want to." As the Board stated in the *Brownwood* case, cited in the margin, "If Respondent did not wish the employees to be concerned with these possibilities there was no need to raise them in the first place. Having sounded the alarm, Respondent cannot so easily avoid the effect of its words."

I find that by Rowe's threats and warnings, Respondent interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed under Section 7 of the Act and thereby violated Section 8(a)(1).

I further find that Rowe's announcement of the incentive wage plan in the April 30 speech and his further promises with respect to it in the May 15 speech, in the context and under the circumstances disclosed by the record,¹² constituted promises and offers of wage increases to induce the employees to reject the Union as their collective-bargaining representative and were reasonably calculated to impinge upon the employees' freedom of choice in the selection of a bargaining representative. It is well established that such promises and offers of benefits are proscribed by Section 8(a)(1) of the Act.¹³

¹⁰ *International Union of Electrical, Radio and Machine Workers, AFL-CIO (Neco Electrical Products Corp.) v. NLRB*, 289 F. 2d 757, 762-763 (C.A.D.C.).

¹¹ See, e.g., *Brownwood Manufacturing Company*, 149 NLRB No. 82.

¹² Although an incentive plan had been announced prior to the destructive fire of February 1963, it was not reinstated after the fire and President Rowe admitted that the incentive plan discussed in the speeches was not the same one which existed before the fire. As previously indicated, this plan was announced so hastily that in the May 15 speech, more than 2 weeks later, President Rowe was asking the employees' forbearance because the technical problems had not been worked out.

¹³ *N.L.R.B. v. Exchange Parts Company*, 375 U.S. 405.

b. *By Department Head Rhodes*

The day before the election, employees Ila Allen was asked by her department head, Eugene Rhodes, if she was coming in to vote. She replied that she did not know what to do and would rather not vote because she did not know which way to vote. Rhodes stated that she should come in and vote because it would probably mean her job if she did not vote. He added that he wanted everyone in his department to vote. The following day, as Allen was walking toward the office where she was going to vote, Rhodes was standing at the end of his table. As Allen walked by, Rhodes admonished her to go in there and vote against the Union or they would lose their jobs.¹⁴

I find that Rhodes' warning to Allen that if she did not come in and vote against the Union her job would be in jeopardy, constituted the type of threat which is obviously violative of Section 8(a)(1) of the Act.

6. Responsibility for the conduct of Frederick Davis

Davis admitted that in May, prior to the election, he contributed to, and participated in the plant in the collection of, funds for the purchase of printed stickers, that he was instrumental in having these stickers distributed and affixed in the vicinity of the plant, and that the stickers stated, "Save your job, vote 'NO' on the 19th." The General Counsel contends, and the Respondent denies, that Davis was a supervisor or agent of Respondent so as to render Respondent liable for his conduct and that therefore Respondent violated the Act by the threat, contained on the stickers, of loss of work if the employees voted for the Union.

I find it unnecessary to resolve these issues. I have already found that Respondent violated the Act by the same threats made by President Rowe in his speeches and by Department Head Rhodes. Therefore, no useful purpose would be served by an additional unfair labor practice finding of the same kind, even assuming that it was warranted by the record, inasmuch as the remedy necessary to effectuate the policies of the Act would be identical in either case.

C. *Discrimination with respect to the hire and tenure of employment of Harlan Jackson and James North*

1. The discharges

The following findings concerning the discharges of employees Jackson and North are not disputed.

a. *Harlan Jackson*

Harlan Jackson was employed by Respondent from July 1, 1963, until his discharge on May 1, 1964, the day after President Rowe's first speech. He signed a union authorization card about April 25, 1964.

About 4:30 p.m. on May 1, Department Head Julie Otwinowski gave Jackson his check and stated, "I am sorry, Harlan, your services are no longer needed." When Jackson asked for a reason, she replied that he knew "perfectly well why." When Jackson persisted that he be given a reason, she replied that he was being laid off because it was a slack period. Jackson then asked and received permission to see Rowe.

Jackson went to the office and asked Rowe if it would be possible for him to transfer to another department. Rowe replied that he never interfered with a supervisor's action in hiring or firing personnel. Jackson then asked if Julie Otwinowski had the last word, and Rowe answered, "Not in this case." Jackson then asked if it would be possible for him to take the job of someone over whom he had seniority and to work for less pay. When Rowe replied in the negative, Jackson asked, "Well, am I to assume that I am being fired for union activities?" Rowe replied that it had been brought to his attention that Jackson had been "annoying" people, and asked if Jackson denied talking to people about the Union. Jackson stated that he had only answered questions asked by friends who approached him about the Union. When Rowe again asked if Jackson was denying that he engaged in union activities during working hours at the plant, Jackson admitted that he was denying it. Rowe informed Jackson that such activity was against the law. Jackson stated that he would have to assume that Rowe was firing him for union activities and that he "would file a formal thing against him with the NLRB." Rowe replied, "Go ahead, I will meet you there with affidavits."

¹⁴ The foregoing findings are based on the credited testimony of Ila Allen who impressed me as a candid and frank witness entitled to full credence. I do not credit Rhodes' denial of her testimony.

b. James North

North was employed by Respondent from the first part of 1962 until his discharge on May 15, 1964. He joined the Union by the time of the open union meeting of April 27.

About 4:30 p.m. on May 15, Department Head Otwinowski told North that they were going to have another layoff and that it was his turn. When she brought his check, North asked her if it was on "account of the Union." She replied that he would have to see Rowe.

North went to see Rowe and told him that Julie Otwinowski had sent him because he wanted to know the reason for his layoff. Rowe stated that he had several complaints from people that North was participating in union activities on the premises. Rowe then added that the Union would probably give North "a shop steward's job or something of that sort." When North answered that he "would have to file an affidavit," Rowe told him to "go ahead."

2. Respondent's defenses

In its answer, Respondent avers that Jackson and North were the only employees known by Respondent to be members or sympathizers of the Union, and further admits that they were discharged "for conducting union organizational activities." At the instant hearing, it amended its answer to admit also that it would not have rehired Jackson and North even if work had been available for them. Respondent defends its conduct on the ground, as further stated in its answer, that the "union-organizational activities" of Jackson and North were conducted on "company property on working hours," and that, "after receiving numerous complaints from fellow employees that they were 'annoyed' or 'pestered' by Jackson and North, they had been admonished that they were not allowed to carry on these activities."

In the first place, as Respondent's promulgated rule against engaging in union activities was invalid because it was too broad in scope and was discriminatorily motivated, as previously found, any discharge action taken thereunder would also be unlawful. Furthermore, it is quite apparent that President Rowe had no conception of the lawful permissible limits for engaging in union activities on company premises. Thus, he admitted at the instant hearing that he interpreted working hours or company time to refer to the period from the time of "clocking in" to the time of "clocking out," a period which would include all coffee breaks. And the record affirmatively shows that Respondent was not interested in, and did not distinguish between, worktime versus nonworktime or work area versus nonwork areas. Therefore, as Respondent made no distinction between nonworktime (such as breaktime) and worktime, it cannot be said that Respondent was attempting to apply the valid portion of the invalid rule, even assuming that such an invalid rule could be dissected in that manner.

In any event, the record shows that at the time of their discharge Jackson and North had not engaged in any union activities for which they could lawfully be discharged and Respondent could not have believed otherwise. Nor does the record support the averment in Respondent's answer that it had received "numerous complaints from fellow employees" that they were "annoyed" or "pestered" by the union activities of Jackson and North.

Jackson was discharged on May 1, 1964, just 1 day after President Rowe for the first time promulgated the invalid rule prohibiting union solicitation or distributions on company premises. Prior to that time, no one had ever informed or warned Jackson not to engage in union activities on company premises. Thus, Respondent could not lawfully have discharged Jackson for union activities on company premises prior to the promulgation of the rule. Yet, the record is completely devoid of any evidence that Jackson engaged in any kind of union activities on the premises after April 30, and Jackson himself credibly testified that he had not done so. On the other hand, the testimony of witnesses for both the General Counsel and Respondent affirmatively shows that Jackson's only "union activities" on the premises consisted of three short conversations with three employees¹⁵ on nonworktime prior to April 30. Joyce Roth, Respondent's only witness against Jackson, admitted that on the only occasion when Jackson spoke to her about the Union she had already punched out and that this occurred prior to April 30. She further testified that the next night, which was still before the day of Jackson's discharge, she reported the incident to Department Head McLaughlin and only told him that after she had punched out Jackson had approached her and "wanted my name and husband's

¹⁵ Bertha Jablonski, Ila Allen, and Joyce Roth.

signature on the union card."¹⁶ She further admitted that it was after Jackson's discharge that McLaughlin prepared a statement about the incident, which she signed at his request. This statement¹⁷ is a complete misrepresentation of what Roth admittedly told him. McLaughlin himself admitted that Joyce Roth had reported this incident to him a few days before Jackson's discharge. He also grudgingly admitted that as early as July 21, 1964, he could not recall any other employee informing him that Jackson had talked to him about the Union on the premises.

As to North, I credit his testimony that he did not solicit or distribute any union cards or union material at the plant during working time. Respondent called three witnesses to support its case against North. Thomas Hampton testified that he saw North pass out some union material during a coffee break time; that, after North's discharge he was asked by Personnel Director Virginia Whitman if he had seen North passing out union combs or cards around the factory; and that he then signed a statement to the effect that he saw North doing so on "company time" because he regarded "company time" as including the coffee break period. Paul Seymour testified that he saw North passing out union cards in the men's room during a coffee break period; that, after North's discharge,¹⁸ he was asked by his foreman if he saw North passing out union cards or combs during factory hours; and that he then signed a statement to the effect that he saw North doing so during "company time" because he also regarded "company time" as including the break period. Miller testified that North had handed him a union card and a comb in the men's room;¹⁹ that he told Personnel Director Whitman about it the next day; that he told her it occurred in the men's room; and that he did not tell her whether it was during breacktime or worktime because she did not ask him.

3. Concluding findings

Upon consideration of all the foregoing and the entire record as a whole, I find that: (1) At the time of their discharge neither Jackson nor North had engaged in union activity on company premises during working time as distinguished from permissible activity during nonworking time; (2) in the case of Jackson, Respondent's supervisors knew at the time of his discharge that he had engaged in no union activity at all after the promulgation of the no-solicitation and no-distribution rule on April 30, and that the only union solicitation in which he had engaged prior to that time was during nonworking time; and (3) in the case of North, one of Respondent's supervisors was aware at the time of the discharge of only one incident in the men's room after April 30 but was not interested to, and did not, find out whether it occurred during the permissible nonwork times.²⁰ I find that Respondent discharged Jackson and North for engaging in protected union activities in support of the Union and thereby violated Section 8(a)(1) and (3) of the Act. I further find that even if, contrary to my previous findings, Respondent had discharged them because it entertained a good-faith but erroneous belief that they had engaged in union activities at the plant during working time in violation of its promulgated rule, such discharges would still be violative of Section 8(a)(1) and (3) of the Act in view of my finding that they had not in fact engaged in such

¹⁶ At one point McLaughlin testified that Roth told him Jackson talked to her while she was working; at another point he testified that Roth did not indicate whether or not she was working at the time. I do not credit McLaughlin's testimony to the extent that it conflicts with that of Roth, a friendly witness for Respondent.

¹⁷ It appears in the record as Respondent's Exhibit No. 2 and reads as follows:

During the period preceding the discharge of Harlan Jackson he was continually attempting to influence some of the night workers into supporting the union activities. He approached me on numerous occasions until he made a pest of himself and I complained to my supervisor.

¹⁸ Seymour admitted on cross-examination that this occurred after North's discharge. In reply to obviously leading and suggestive questions on redirect examination, he vacillated and finally stated that he was not certain whether he was questioned by his foreman before or after North's discharge. Under all the circumstances disclosed by the record, I credit Seymour's testimony on cross-examination.

¹⁹ I do not credit Miller's testimony to the extent that it may indicate that these incidents occurred during working time. Miller was a voluble, rambling, witness whose breath reeked with alcohol at the time of his testimony.

²⁰ The correctness of the foregoing findings are verified by the decision of the referee as a result of an unemployment compensation hearing at which Respondent was represented.

activities.²¹ A consideration of all the evidence further convinces me, and I find, that in discharging Jackson and North, Respondent was motivated by a desire to rid itself before the May 19 election of the two adherents of the Charging Union it admitted knowing were in its employ, and that the alleged violations of the rule was advanced as a pretext to cloak its discriminatory motivation. This conclusion is further buttressed by the credited and undenied testimony of North that during the summer of 1964 Department Head Lee stated, in response to a comment by employee Earl Johnson which referred to North as "one of those union fellows," that North was discharged for following Jackson and that Lee probably could have saved North if he could have talked to North before it happened. I therefore find that the discharges were violative of Section 8(a)(1) and (3) of the Act also on this ground.²²

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship 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.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Harlan Jackson on May 1, 1964, and James North on May 15, 1964, I will recommend that Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination practiced against them, by payment to each of a sum of money equal to that which each normally would have earned as wages from the date of their discharge to the date of Respondent's offer of reinstatement, less the net earnings of each during said period, with backpay and interest thereon to be computed in the manner proscribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Because of the character and scope of the unfair labor practices found to have been engaged in by Respondent, I will recommend that it cease and desist from in any other manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.²³

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Building Service Employees Union, Local No. 307, Building Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminating with respect to the hire and tenure of employment of Harlan Jackson and James North, thereby discouraging membership in the above-named labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

3. By the foregoing conduct and by the conduct of President Rowe and Department Heads Lee, McLaughlin, and Rhodes detailed in section III, B, *supra*, more particularly surveillance and instructions to guards to engage in surveillance and interrogation, suggesting to and urging an employee to take steps to form an inside union in an effort to induce employees to reject and withhold their support from the above-named Union, promulgating a no-solicitation and no-distribution rule which was in-

²¹ *N.L.R.B. v. Burnup and Sims, Inc.*, 85 S. Ct. 171, 57 LRRM 2385 [379 U.S. 21], decided November 9, 1964.

²² Respondent at the hearing also attempted to show that Jackson had a poor attendance record as having a bearing on reemploying him. However, the record does not support Respondent's contention as to Jackson's attendance record. Moreover, Respondent's own records show that other employees with admittedly poor attendance record were recommended for reemployment.

²³ *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4).

valid because of its scope and because it was for the purpose of impeding and defeating union organization, threats and warnings of loss of jobs if the employees voted for the Union, and promises and offers of wage increases through an incentive plan to induce the employees to reject the Union, Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby recommend that Respondent, Rowe Industries, Inc., Sag Harbor, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, or activities on behalf of, Building Service Employees Union, Local No. 307, Building Service Employees International Union, AFL-CIO, or any other labor organization, by discriminatorily discharging or refusing to reinstate employees, or by discriminating against them in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

(b) Engaging in surveillance, or instructing guards or others to engage in surveillance, of employees' protected union or concerted activities.

(c) Interrogating employees as to their own or other employees' union sympathies or activities, or suggesting and urging employees to take steps to form an inside union, in a manner constituting interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.

(d) Discriminatorily promulgating or applying a no-solicitation or no-distribution rule for the purpose of impeding or defeating union organization.

(e) Prohibiting employees from soliciting on behalf of the above-named or any other labor organization on plant premises during nonworking time, including break periods, or from distributing union materials in nonworking areas of the plant premises on such nonworking time.

(f) Threatening employees with loss of jobs or other economic reprisals if they selected the above-named or any other labor organization as their collective-bargaining representative.

(g) Promising, offering, or granting wage increases or other economic benefits to induce the employees to reject the above-named or any other labor organization.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representative of their own choosing, to engage in concerted activities for the purposes of collective-bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos in Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Rescind its no-solicitation and no-distribution rule to the extent that it prohibits employees from engaging in union solicitations on plant premises during nonworking time, including break periods, or from distributing union materials in nonworking areas of the plant premises on such nonworking time.

(b) Offer to Harlan C. Jackson and James W. North immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination practiced against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board and its agent, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to determine the amount due as backpay.

(d) Notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(e) Post at its plant in Sag Harbor, New York, copies of the attached notice marked "Appendix A."²⁴ Copies of said notice, to be furnished by the Regional Director for Region 29 (New York, New York), shall, after being duly signed by authorized representatives of the Respondent, be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by said Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the said Regional Director, in writing, within 20 days from the date of this Decision and Recommended Order, what steps the Respondent has taken to comply herewith.²⁵

²⁴In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

²⁵In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in, or activities on behalf of, Building Service Employees Union, Local No. 307, Building Service Employees International Union, AFL-CIO, or in any other labor organization, by discriminatorily discharging or refusing to reinstate employees, or by discriminating against them in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT engage in surveillance, nor will we instruct guards or others to engage in surveillance of employees' protected union or concerted activities.

WE WILL NOT interrogate employees as to their own or other employees' union sympathies or activities, nor will we suggest or urge employees to take steps to form an inside union, in a manner constituting interference, restraint, or coercion within the meaning of Section 8(a)(1) of the Act.

WE WILL NOT discriminatorily promulgate or apply a no-solicitation or no-distribution rule for the purpose of impeding or defeating union organization.

WE WILL NOT prohibit employees from soliciting on behalf of the above-named or any other labor organization on plant premises during nonworking time, including break periods, or from distributing union materials in non-working areas of the plant premises on such nonworking time, and our no-solicitation and no-distribution rule is rescinded to that extent.

WE WILL NOT threaten employees with loss of jobs or other economic reprisals if they selected the above-named or any other labor organization as their collective-bargaining representative.

WE WILL NOT promise, offer, or grant wage increases or other economic benefits to induce employees to reject the above-named or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos in Section 8(a)(3) of the Act.

WE WILL offer to Harlan C. Jackson and James W. North immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and will make them whole for any loss of earnings suffered as a result of the discrimination against them.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named or of any other labor organization, except to the extent that such right may be affected by the provisos of Section 8(a)(3) of the Act.

ROWE INDUSTRIES, INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

NOTE.—In the event the above-named employees are presently serving in the Armed Forces of the United States we will notify them of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Fourth Floor, 16 Court Street, Brooklyn, New York, Telephone No. 596-3751, if they have any question concerning this notice or compliance with its provisions.

Orkin Exterminating Company of Florida, Inc. and Truckdrivers, Warehousemen and Helpers of Jacksonville, Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case No. 12-CA-2799. April 23, 1965

DECISION AND ORDER

On October 30, 1964, Trial Examiner Alba B. Martin issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended dismissal of those allegations. Thereafter, the Respondent and the General Counsel filed exceptions to the Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Jenkins].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.¹ The rulings are hereby affirmed. The Board has considered the Trial Exam-

¹The Respondent contended that the Trial Examiner's credibility resolutions in favor of the General Counsel's witnesses demonstrated his bias and prejudice against the Respondent. We find, upon careful analysis of the entire record, that the Trial Examiner was not biased and prejudiced as his credibility findings resulted from a fair appraisal of the evidence as a whole and the demeanor of the witnesses.