Local No. 256, International Molders' and Allied Workers' Union, AFL-CIO-CLC (United States Pipe and Foundry Company) *and* Independent Workers Association. Case 10-CB-3094

December 24, 1980

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND ZIMMERMAN

On August 22, 1980, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in answer to the General Counsel's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel, claiming that Respondent in its brief argues issues found *contra* to it by the Administrative Law Judge which were not addressed by the General Counsel's exceptions, has filed a motion to strike Respondent's "cross-exceptions," or, in the alternative, a motion to receive counsel for the General Counsel's answering brief to Respondent's "cross-exceptions." In view of our disposition of this case, we find it unnecessary to address the contentions raised by the General Counsel's motion.

[2] In adopting the Administrative Law Judge's recommended disposition of this case, we find it unnecessary to rely upon his general discussion of *res judicata* or upon the district court's opinion which he quoted in the section of his Decision entitled "Analysis and Concluding Findings."

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: Upon a charge filed on May 16, 1979, by Independent Workers Association (herein IWA), against Local No. 256, International Molders' and Allied Workers' Union, AFL-CIO-CLC (herein Respondent), the General Counsel of the National Labor Relations Board, through the Regional Director for Region 10 of the Board, issued his complaint and notice of hearing dated July 27, 1979. The complaint alleges, in essence, that Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended (herein the Act), by failing to process a grievance filed by an employee, Richard C. Hall, because the said Hall was not a member of Respondent and for other arbitrary, invidious, and irrelevant reasons. Respondent, by its duly filed answer, generally admitted the jurisdictional allegations of the complaint but denied that the aforesaid grievance was not processed because the said Hall was not a member of Respondent, or that the decision to drop the grievance was the result of any arbitrary, invidious, or irrelevant conduct on the part of Respondent.

A hearing was held in Birmingham, Alabama, on February 13 and 14, 1980, in which all parties participated. Post-hearing briefs were filed by counsel for all parties, which have been duly considered.

On July 16, 1980, I was in receipt of a "Motion To Reopen the Record," filed by counsel for Respondent, the purport of which was to receive in evidence a decision of the United States District Court for the Northern District of Alabama in which the said Hall was plaintiff and Respondent was defendant.[1] The case was one filed by the said Hall under Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185) against Respondent herein alleging wrongful and unlawful conduct on the part of Respondent similar to that which is alleged herein by the General Counsel. After a full hearing on the merits, the United States District Court entered a judgment in favor of the defendant (Respondent herein) finding, in essence, that the plaintiff failed in his proof that the defendant did not fulfill its duty of fair representation to those within the bargaining unit; whereupon Respondent moved that I should consider the decision of the court to be *res judicata*, or collateral estoppel, as respects the matter *sub judice*.[2]

I am of the view that there exists considerable merit to the contention of Respondent that the decision of the court should operate as *res judicata* in this matter in the light of the fact that all factors considered to be prerequisites to the imposition of such doctrine appear to be present, and in the light of the policy considerations enunciated by the United States Court of Appeals for the Fifth Circuit in *Painters District Council No. 38, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO* v. *Edgewood Contracting Company*, 416 F.2d 1081 (1969). However, on the other hand, I am aware that the Board guards rather zealously its power and prerogative under Section 10(a) of the Act.[3] Although the Board, in *General Motors Corporation*,[4] did not appear to be inhospitable to the invocation of such doctrine in appropriate cases, it would not seem appropriate for an ad-

[1] Civil Action No. 79-P-0378-S; United States Pipe and Foundry Company, Hall's employer, was also a named defendant.

[2] The time for appeal has expired.

[3] Sec. 10(a) of the Act reads as follows:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

[4] 158 NLRB 1723, 1728 (1966).

ministrative law judge to invoke the doctrine in such circumstances as are here presented without more affirmative direction. Accordingly, I shall deny the motion while admitting the decision of the court to be received in evidence as Respondent's Exhibit 15.[5]

Upon the entire record in the case, and from my observation of the demeanor of the witnesses,[6] I make the following:

FINDINGS OF FACT

I. COMMERCE

The Employer involved herein, United States Pipe and Foundry Company, is, and has been at all times material, a Delaware corporation with an office and place of business located in Birmingham, Alabama, where it is engaged in the manufacture of cast iron pipe.

During an annual period, which period is representative of all times material herein, the said Company sold and shipped finished products valued in excess of $50,000 from its Birmingham, Alabama, facility directly to customers located outside the State of Alabama.

I find, as the answer admits, that the said Company is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue Involved*

The sole issue involved is, as stated in the brief of counsel for the General Counsel, whether Respondent's failure to process employee Richard Hall's grievance to arbitration violated Section 8(b)(1)(A) of the Act.

B. *The Facts*

As previously noted, the Employer has, at all times material, operated a plant in Birmingham, Alabama, where it is engaged in the manufacture of cast iron pipe. Its production employees have, at all times material, been represented for purposes of collective bargaining by Respondent, and the last collective-bargaining agreement between the Employer and Respondent became effective January 24, 1978, to run for a 3-year period. Said collective-bargaining agreement contains a grievance procedure culminating in final and binding arbitration before an independent arbitrator selected by the parties (art. VI).

For approximately 13-1/2 years prior to the events giving rise to the issue in this case, Richard Hall was an employee of the Company in the unit covered by the collective-bargaining agreement and a member of Respondent. However, sometime in 1977, Hall ceased being a member of Respondent, and commenced engaging in some organizational activities on behalf of a rival union, IWA. The record shows that in the fall of 1977 IWA filed an election petition with the NLRB (Case 10-RC-11257), which culminated in an election in which both IWA and Respondent were on the ballot. Such election was held on January 6, 1978, and resulted in Respondent's receiving 234 votes and the IWA's receiving 182. Thereafter, Respondent was certified as the exclusive bargaining representative of the unit.

Approximately 1 year later, on or about January 15, 1979, Hall was terminated as a consequence of events which occurred on December 30, 1978. On that date, Hall worked an overtime shift from 12 noon until 8 p.m. He was terminated by the Employer assertedly because he left the plant premises at approximately 6 p.m. without permission, returning at approximately 8 p.m. to clock out. Thus, the Company's reason for the termination was twofold: (1) leaving the plant without permission, and (2) falsifying time records; i.e., claiming 2 hours of work when he had not actually been present.

The same day, January 15, 1979, Hall contacted Respondent's committeeman, James Wright, and advised Wright that he wished to file a grievance against the Company. Wright provided Hall with the grievance forms and advised him how to fill them out and file them. On January 16, Hall brought the completed papers back to Wright and gave Wright the names of some of his coworkers who Hall claimed could "verify that [Hall] was on company property at that time."[7] After Wright signed the grievance, Hall filed it with the Company on January 16, 1979.

Shortly thereafter, Respondent assigned committeemen Wright and Wilfred Borden to investigate the case. Borden testified that he asked Hall whether anyone was with him at the time he clocked out that night, and Hall responded yes, there were two employees—Jimmy Lee (Peter) Burton and Wilson Bolden—with him when he clocked out. However, Borden testified that, when he (Borden) talked to Peter Burton concerning the night in question, the latter told Borden that, although he and Hall started out of the plant together, Hall turned around and went back saying that he had to put up something. Accordingly, Burton did not corroborate Hall with respect to the point that the three employees clocked out together. Borden further testified that he spoke with Wilson Bolden, who told him the same thing.[8]

Committeeman Borden then testified that he spoke with plant guard Jessie Manuel concerning the incident. Manuel positively identified Hall as the person who left the plant that evening, and was gone for some time before returning to clock out. Manuel further advised Borden that, when Hall saw the guards observing him

[5] It should be noted that, while I have denied the motion to dispose of the case by the vehicle of *res judicata*, my impressions of the witnesses are in accord with those of the district judge, and I reach a similar result.

[6] Cf. *Bishop and Malco, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

[7] Hall claimed that he never left the company property—that the person whom the company guard saw leave the property in an automobile was, in fact, Hall's brother, who, Hall claimed, frequently used his car while Hall was at work. Hall's brother was not an employee of United States Pipe and Foundry Company.

[8] Bolden further advised Borden that he (Bolden) would rather not get involved in an arbitration proceeding.

from the guardhouse, Hall attempted to "hide his face," but nevertheless Manuel, who had known Hall for about 4 or 5 years, recognized him.

Committeeman James Wright testified that he also interviewed Burton and Bolden respecting their association with Hall that evening, and they more or less corroborated the information that they had given committeeman Borden. In addition, Wright spoke with a third employee—Maceo Cleggett—who also stated that he had started to the clockhouse with Hall, but that Hall had returned for something and the other three proceeded to the gate to clock out.

Meanwhile, Respondent processed Hall's grievance through the several steps of the grievance procedure; however, the Company refused to retreat from its position that the discipline meted out to Hall was correct. On or about February 10, Respondent's grievance committee met to consider whether the Hall grievance, and another grievance filed by employee Johnny Morton, should be taken to arbitration.[9] At the meeting, both the Hall and Morton grievances were considered, and, according to the minutes thereof, a lengthy discussion was had. However, at the close of such discussion, a motion was made and carried that the Morton grievance be referred to the district representative for his advice on arbitration while a motion by the chairman of the committee (Earl Hyde) was made and carried that the Hall grievance be dropped for lack of merit.

C. *Analysis and Concluding Findings*

The principles of law applicable to the issue in the instant case were recently set forth by an Administrative Law Judge (affirmed by the Board), as follows:[10]

> The principles of law that must guide decision on the issue in this case are well settled. A union occupying an exclusive bargaining status must serve the interests of all bargaining unit employees fairly and in good faith, and without hostile discrimination against any of them on the basis of arbitrary, irrelevant, or invidious distinctions. See, e.g., *Vaca* v. *Sipes*, 386 U.S. 171; *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers* [*Goodyear Tire & Rubber Co.*] v. *N.L.R.B.*, 368 F.2d 12 (5th Cir. 1966), cert. denied 389 U.S. 837; *Miranda Fuel Co.*, 140 NLRB 181. The Supreme Court has recognized, however, that in the interest of effectively administering a contract's grievance-arbitration machinery a union must be allowed a considerable range of discretion in screening out, settling, or abandoning, short of arbitration, those grievances which the union in good faith believes do not justify that costly and time-consuming final step. *Vaca* v. *Sipes, supra* at 191–192. Accordingly, the Supreme Court has held that an individual grievant has no absolute right to have his grievance taken to arbitration. No inference of unfair representation may, therefore, be drawn simply from a bargaining agent's failure or refusal to press a grievant's case through the ultimate stage of a contract's grievance-arbitration procedures, or, for that matter, through any intermediate stage. And this, it has been held, is so even though it appears that the union may have acted negligently or exercised poor judgment in its handling of a grievance. *Bazarte* v. *United Transportation Union*, 429 F.2d 868, 872 (3d Cir.). "A breach of the statutory duty of unfair representation," the Supreme Court has made clear, "occurs only when a union's conduct toward a member of the collective-bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes, supra* at 190.

Applying the foregoing principles to the facts in the case at bar, I conclude that the General Counsel has failed to sustain his burden of proving by substantial evidence that Respondent violated its obligation to Hall under Section 8(b)(1)(A) of the Act.

Thus, from the outset, the evidence is clear that the agents of Respondent, upon learning of Hall's discharge and his wish to file a grievance, were sympathetic and helpful in providing Hall with information and forms necessary to pursue his desire. There was no reluctance or delay on the part of Respondent's agents in performing their duties in this regard, and they solicited Hall's evidence with respect to those witnesses who he claimed would be helpful in backing his claim. Moreover, there is certainly no evidence of personal animosity on behalf of any of Respondent's agents against Hall as a consequence of any activities he may have engaged in on behalf of IWA.[11]

The evidence further supports Respondent's contention that a reasonable investigation was made of the Hall grievance. Respondent's agents interviewed all of the witnesses whom Hall presented in support of his case, and there is no showing that they failed to consider any evidence contended by Hall to support his case. Unfortunately, from Hall's standpoint, his witnesses did not fully support his story that they all clocked out together. Moreover, and perhaps more importantly from the standpoint of assessing the merits of Hall's case and its capacity to withstand the tests of the arbitration process, Hall never presented during the investigation of his grievance the key witness who would show that he (Hall) never left the plant during the evening of December 30. This, of course, was his brother. Certainly, Respondent was entitled to place great weight upon that point in assess-

[9] The record shows that Morton, who was a member of Respondent, was terminated by the Company on December 29, 1978, for leaving company property assertedly for 2-1/2 hours. Morton, too, filed a grievance which was investigated by agents of Respondent. However, in that grievance, Morton admitted leaving the plant for a short while to go to a nearby snack bar to obtain food, but claimed he was only away for approximately one-half hour. He further acknowledged that some form of penalty might be appropriate, but that discharge was "too severe." (G.C. Exh. 5.)

[10] *Local 575, Packinghouse Division, Amalgamated Meat Cutters and Butcher Workmen, (UPWA), AFL-CIO (Omaha Packing Company)*, 206 NLRB 576, 579 (1973).

[11] There is indeed a lack of substantial evidence that Respondent's agents were aware that Hall took an active part in the election campaign which had occurred about a year prior to the events in this case. However, the evidence does show that Hall was not a member of Respondent at the time of the discharge, and it may be reasonably inferred that the agents of Respondent were aware of that fact, and were doubtless not sympathetic with Hall's status in that regard.

ing the merits of Hall's case. Furthermore, with respect to the assessment of Hall's case, and the possibility of being successful in an arbitration proceeding, the record shows that Respondent's agents placed substantial credence in the testimony of the plant guard, Jessie Manuel, who was, essentially, a disinterested witness. The latter testified in the instant proceeding and was, indeed, an articulate, candid, and impressive witness.

Of course, the General Counsel and the Charging Party, in support of their contention, rely heavily upon the contrasting conduct of Respondent in approving the Morton case for arbitration while rejecting the Hall case. However, there is a significant difference which Respondent was entitled to consider in making such an assessment. This was the fact that Morton was absent from the plant only a short period of time, and had left solely for the purpose of obtaining food.[12] More importantly, perhaps, was the fact that Morton acknowledged his error and contended only that the penalty was too severe. Thus, there was no issue of credibility which Respondent was certainly entitled to consider in assessing the merits of the cases for arbitration.[13]

Finally, there is in the instant record no showing that Respondent regularly and consistently failed to represent and pursue grievances of nonmembers. To the contrary, as the district court noted in its opinion:

> The evidence also indicates that there had been non-members, or persons indeed who were active in supporting another union, whose grievances have been pursued, and pursued to arbitration, when the union believed that the matter was meritorious.[14]

On the basis of all of the foregoing, I find and conclude that the evidence does not sustain the contention of counsel for the General Counsel and of the Charging Party that Respondent acted arbitrarily, discriminatorily, or in bad faith with respect to the pursuing of the Hall grievance to arbitration. Accordingly, I conclude and find that the evidence does not sustain a finding of a violation of Section 8(b)(1)(A) of the Act.[15]

CONCLUSIONS OF LAW

1. United States Pipe and Foundry Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not, as alleged in the complaint, engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

Based upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby make the following recommended:

ORDER[16]

The complaint should be, and hereby is, dismissed.

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[12] There is unrefuted testimony in the record that it was common practice of employees who were working overtime (as was the case here) to leave and get some food and return "with or without the permission of the supervisor because the supervisor was so glad to get somebody to work."

[13] On this point, the United States District Court in the Sec. 301 case observed as follows:

> The mere fact that the union might, or some union members might, conclude that they might win the arbitration does not mean that they are obliged necessarily to pursue that, if they believe in good conscience that the story being told is false.
>
> This Court could hardly rule otherwise, and put on to a union the obligation, as a matter of some statutory duty, of pursuing a matter which in good conscience it believes not to be honest and truthful.

[14] SI. op. at p. 14.

[15] *Electric Utility Workers Union (Independent) (Indianapolis Power & Light Company)*, 208 NLRB 124, fn. 1 (1974).

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.