Alfred M. Lewis, Inc. *and* Warren J. McCarty.
Case 28-CA-5596

September 26, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On July 18, 1980, Administrative Law Judge Martin S. Bennett issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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,[1] 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 has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

MARTIN S. BENNETT, Administrative Law Judge: This matter was heard before me in Phoenix, Arizona, on May 6 and 7, 1980. The complaint, issued December 28 and based on charges filed November 13 and December 17, 1979, by Warren J. McCarty, an Individual, alleges that Respondent, Alfred M. Lewis, Inc., has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act. Briefs have been submitted by the General Counsel and Respondent and have been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses including their demeanor, I make the following:[1]

[1] A post-hearing motion by the General Counsel to correct the record in 33 respects, dated May 30, 1980, and unopposed, is hereby granted.

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Alfred M. Lewis, Inc., a California corporation, maintains an office and place of business at Phoenix, Arizona, where it is engaged in the wholesale, sale, and distribution of dry groceries, refrigerated foods, and related products. It annually purchases and causes to be transported in interstate commerce and delivered to its place of business in Arizona, groceries and other items valued in excess of $50,000 directly from suppliers located in States other than the State of Arizona. I find that the operations of Respondent affect commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act, as amended.

II. THE LABOR ORGANIZATION INVOLVED

Transport & Local Delivery Drivers, Warehousemen & Helpers, Local No. 104, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction; The Issue*

The sole issue herein is whether Respondent in August 1979 denied employee Warren J. McCarty[2] a 15-minute break, and whether Respondent thereafter, about September 17 and 20, discriminated against and discharged McCarty because he asserted rights under the collective-bargaining agreement between the Union and Respondent. According to Respondent, he was discharged solely because he had stolen production time at work or, stated otherwise, had falsified production records by claiming payment for work not actually performed by him. As found below, the evidence preponderates in favor of Respondent's position.

B. *Sequence of Events*

The warehouse and trucking employees of Respondent are represented for the purposes of collective bargaining by the Union and, at the time relevant herein, a 3-year collective-bargaining agreement covered the term from March 1, 1978, up to and including February 28, 1981.

McCarty initially entered the employ of Respondent on February 20, 1978, as a part-time employee on the night shift. Approximately 1 month later, he became a full-time employee on the night shift in the grocery warehouse and, during July, August, and September 1979, he was employed principally in the tobacco, candy, and repack rooms of the grocery warehouse. His starting time for the night shift commenced at 2 p.m., and he was under the primary supervision of Supervisor Randy Baughman.

Article XI of the contract treats with meal and break periods and generally provides that during an 8-hour shift employees are entitled to two rest breaks, each of

[2] To be distinguished from fellow employee and Job Steward Michael K. McCarthy of Local 104.

15 minutes' duration, which are compensated, and also to a half hour lunchbreak, which is not compensated. Employees who work overtime past 8 hours are entitled to an additional 15-minute break at approximately the 10th hour when an employee is to work 11 or more hours. During the 3-month period, stated above, these employees did work a great deal of overtime. Stated otherwise, employees who started their shift at 2 p.m., as did McCarty, and then worked until 1:30 a.m. would have put in 11 hours of time for which they were compensated.

On a particular shift, during August 1979, McCarty was working in the candy room around 1 a.m. Shortly after 1 a.m., he admittedly made a comment to his coworkers in the presence of Baughman that the other employees should slow down in order to obtain an additional 15-minute break. Several minutes later and shortly before 1:30 a.m., Baughman, who had heard this comment, told McCarty to punch out and go home; one effect of this was to deprive him of eligibility for an additional 15-minute break.

Some weeks later, on September 17, 1979, McCarty was given an indefinite suspension by Respondent. As he was told, and his own testimony so demonstrates, this resulted from the Company's conclusion that he was suspected of cheating on his production cards. Several days later, on September 20, this discipline was increased to a discharge.

As for the August incident, it is clear that McCarty was not entitled to an extra break because he did not work a full 11 hours. And there is substantial evidence that it was the normal practice of Respondent to give the break at different times, varying from 1 to 1:30 a.m.

Baughman testified that he generally tried to send home employees who disliked working overtime, and on the night in question he followed this policy precisely. Thus, it is uncontroverted that shortly after 1 a.m., he sent home employee Wesley because he knew of the latter's distaste for working late. As Baughman testified, and I find, he did not need McCarty any longer that evening and, moreover, he was aware of McCarty's prior statement to employees suggesting a slowdown so as to be awarded an additional break.

On September 17, just after McCarty reported to work at 2 p.m., he was called to a meeting with Dave Ashby, superintendent of operations; Baughman; and Union Steward Mendias. Ashby told McCarty, as the latter testified, that he was suspected of cheating on his production cards and that he was suspended until further notice. He was further told that Baughman had observed this cheating on the prior shift, and that fellow union members had turned him in, and the record supports the latter finding.

Indeed, in his testimony at the instant hearing McCarty, in effect, admitted that he had cheated on his production card on the night in question. While the precise facts are not entirely clear, it appears that his production card showed him as working time that he had not.

Both Ashby and Baughman testified, and I find, that McCarty admitted his cheating at the meeting on September 17. McCarty did deny that he had made such an admission, but he did not deny that he was actually engaged in cheating. And the cheating is corroborated elsewhere.

The basic case of the General Counsel is that Respondent was determined to "get" McCarty for his persistence in asserting his rights under the collective-bargaining agreement. There is evidence of a number of contract grievances filed by McCarty with the Union. However, although he was suspended on a number of occasions during 1979, only one such suspension was ever submitted to the grievance and arbitration procedures set forth in the agreement, and this was won by McCarty after his discharge. These grievances to the Union include those dated January 10, July 2, and September 4, 1979.

There is also most persuasive evidence from Normal Thelen, employee relations manager and safety coordinator of Respondent. The General Counsel adduced evidence that various employees including McCarty had gone to OSHA and filed a grievance about working conditions. Her testimony is not controverted, and I find that this never came to the attention of Respondent although another matter involving other employees in an OSHA matter did. And the testimony of Thelen also discloses, and this is not controverted, that Respondent does not receive copies of complaints filed by an employee with the Union. She was aware of only one grievance filed by him which came to the attention of Respondent.

The General Counsel does rely on certain testimony by Union Steward Mike McCarthy. According to Baughman, it was McCarthy who initially notified him that McCarty was cheating on his production cards. Significantly, McCarty, although presumably available, was not brought back as a rebuttal witness to controvert this.

According to McCarty, Baughman told him in June or July that McCarty was a thorn in the side of Respondent, which would like to find a way to discharge him.[3] Baughman flatly denied that there was any attempt to "set-up" McCarty on the subject of cheating on production records and testified, without contradiction, that it was McCarty who approached him in the warehouse and advised him that McCarty was cheating on his production records, and that the other men did not like this. As a result, Baughman reported this incident to Ashby and it was Ashby who instructed him to conduct an investigation of employees to determine whether any cheating was taking place.

As a result, Baughman investigated the matter on the next shift of September 16, and determined that McCarty was in fact cheating. Indeed, Night Warehouse Supervisor Jim Theis was called to the scene by Baughman to verify this; this was done at the prior suggestion of Ashby who desired verification of any such matter. And the record has disclosed this verification by Theis, both in his testimony and in writing.

[3] There is testimony about an incident when Baughman and other employees were drinking beer after work and there was some joking about the incident when McCarty was sent home before completing 11 hours, and as a result was allegedly put in his place. I see nothing here which assists the General Counsel or is dispositive of the issue before me.

If the testimony of McCarty is to be believed, it would follow that he, a union steward, sat by idly and did nothing while McCarty, his union brother, was discharged according to a plan set up by Respondent. McCarty did present some testimony that other employees were cheating on their production records in similar fashion, but this is not supported. He did name a number of employees who were so engaged and two of them, Kuban and Bond were called as witnesses; they were unimpressive or evasive and denied that they were involved in any such system of cheating on production. Indeed it was only Steward McCarty, who admitted that he was involved on occasion in cheating in this manner.

There is also evidence that at a later date, on January 28, 1980, management personnel questioned all employees in the tobacco, candy, and repack rooms about McCarty's allegations of widespread cheatings, but understandably received no admissions of such misconduct.

C. *Concluding Findings*

To sum up, the General Counsel has not met its burden of proof with respect to McCarty. On the other hand, Respondent has offered plausible and sensible reasons for the actions taken against him, and specifically because he was caught cheating on his production records, a factor he in effect admitted. And as for the incident when he was sent home several minutes early because he was not needed, and because several minutes earlier he had openly encouraged other employees to slow down in order to get an additional break, I fail to see how this assists the General Counsel, although Respondent may not have been averse to the opportunity to take this action.

In essence then, I find that the evidence preponderates in favor of the position of Respondent herein, although the General Counsel has argued forcefully at length in favor of its position. And while there is some testimony as to working practices of an unauthorized nature, I see nothing sufficient to affect these findings in favor of Respondent. I shall therefore recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. Alfred M. Lewis, Inc., is an employer whose operations affect commerce within the meaning of Section 2(6) and (7) of the Act.
2. Transport & Local Delivery Drivers, Warehousemen & Helpers, Local No. 104 is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[4]

The complaint is dismissed in its entirety.

[4] 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.