Airco Alloys, a Division of Airco, Inc. *and* Willie R. Rivers, Jr. Case 3-CA-8742

May 14, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND TRUESDALE

On November 20, 1979, Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in response to the General Counsel's 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 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.[2]

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.

CHAIRMAN FANNING, concurring in part:

For reasons stated in my dissenting opinion in *Baton Rouge Water Works Company*,[3] I disagree with the Administrative Law Judge's finding, adopted by my colleagues, that the October 13, 1978, meeting between Respondent and Willie Rivers does not fall into the class of "discussion" or "interview" to which the right of union representation would attach under *Weingarten* because Respondent had made its termination decision before the meeting. In order to trigger *Weingarten* rights, however, it is necessary that the employee seeking the assistance of a union representative specifically request such representation.[4] Here, it is evident that Rivers failed to make personally a request for union representation at the October 13 meeting.[5] For reason, I agree that an 8(a)(1) violation has not been established and I shall concur in the result.

[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.

[2] Subsequent to the issuance of the Administrative Law Judge's Decision in this case, the Board issued *Baton Rouge Water Works Company*, 246 NLRB No. 161 (1979), wherein it held that "an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision." 246 NLRB No. 161. Inasmuch as the facts and the Administrative Law Judge's conclusion herein fall within the purview of *Baton Rouge*, we agree that the circumstances do not present a violation under *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[3] 246 NLRB No. 161 (1979).

[4] See, e.g., *Kohl's Food Company.*, 249 NLRB No. 13 (1980); *First National Supermarkets, Inc. d/b/a Pick-N-Pay Supermarkets, Inc.*, 247 NLRB No. 162 (1980).

[5] There is some suggestion that, under these circumstances, any request for representation by Rivers would have been futile. Whatever bearing this "futility" rationale may have on an employee's entitlement to *Weingarten* rights, this question need not be decided here because, in my judgment, the record does not conclusively show that a request by Rivers for union representation would, in fact, have been futile.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge: This case was heard at Buffalo, New York, on August 16, 1979. The charge was filed by Willie R. Rivers, Jr., an individual, herein called Rivers or the Charging Party, on October 17, 1978.[1] The complaint was issued on April 10, 1979, and alleges violations of Section 8(a)(1) of the National Labor Relations Act, herein called the Act, by Airco Alloys, A Division of Airco, Inc., herein called the Respondent or the Company. The issue presented by the case is whether the Respondent in meeting with, and discharging, Rivers on October 13, violated his right to union representation under Section 7 of the Act as outlined in *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, is engaged in the manufacture, sale, and distribution of alloys and metal products with its principal office and place of business in Niagra Falls, New York. The Respondent, at its Niagra Falls facility, annually sells and distributes its products valued in excess of $50,000 directly to customers located outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find, that United Steelworkers of America, Local 12646,

[1] All dates are in 1978 unless otherwise stated.

AFL-CIO, CLC. herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Material Facts and Positions of the Parties*

The Union has represented the Respondent's production and maintenance employees for a number of years, and has entered into successive collective-bargaining agreements with the Respondent covering such employees. The latest such agreement was executed and became effective on May 2, 1978, and remains in effect until April 30, 1981. The agreement contains a union-security provision which requires, as a condition of employment, that employees hired after the effective date become members of the Union on the 30th day following the beginning of their employment.[2] However, notwithstanding the requirement of union membership after 30 days, the agreement provides that seniority does not commence to accumulate for new employees until the employee has successfully completed a probationary period of 60 working days. During the probationary period, according to the agreement, the probationary employee is subject to transfer, demotion, layoff, or discharge at the sole discretion of the Company.[3] While the agreement contains a provision for the processing and resolution of grievances regarding discharges there was no evidence that the Union had ever sought to process any grievances regarding the transfer, demotion, layoff, or discharge of any probationary employees.

Willie R. Rivers, Jr., was employed by the Respondent on August 7, and worked as a maintenance mechanic. Pursuant to the union-security provision in the collective-bargaining agreement he joined the Union and paid certain initiation fees to the Union's president, Mike Stopa, during the first part of October. Rivers testified that he was told by Stopa that in the event he did not successfully complete his probationary period his money would be refunded by the Union.

Rivers' employment was not without problems,[4] and he was told during the first week of October by one of his foreman, S. J. Obidzinski, who was going on vacation, that he wanted Rivers to really apply himself in his work the following week because another foreman, Williams Banks, would be supervising Rivers and Rivers should "watch out" for Banks.

On October 13, Rivers was called to the personnel office where he met with James Cheetham, personnel and safety manager for the Respondent, foreman Banks, and another of Rivers' foremen, Chester Cooper.[5] In the ensuing interview with Rivers which lasted about 15 minutes according to Rivers' estimate Cheetham discussed Rivers' job performance with him and advised him that he was discharged. Rivers concedes in his testimony that while he attempted to defend and explain his job performance, he was not asked any questions by Cheetham or the foremen present. Rivers further conceded that at no time did he request union representation during the interview. Upon completion of the interview he was ushered from the plant and subsequently paid off by mail a few days later.

It is the General Counsel's contention that the Respondent violated Section 8(a)(1) of the Act by depriving Rivers of his right to union representation during the October 13 interview under the principles enunciated in the *Weingarten* case, *supra*. In support of this position the General Counsel argues; that the interview with Rivers was not simply to announce a *fait accompli*, but to discuss Rivers' work performance. Rivers had even attempted to negotiate a transfer to another department as an alternative to discharge. Moreover, while the General Counsel concedes that Rivers did not request union representation during the interview it is argued that such request would have been futile based on the Respondent's present assertions of contract rights and also because of events which occurred during the meeting which effectively deprived Rivers of union representation. In this regard the General Counsel refers to the uncontradicted testimony of Gaddis Rivers, an uncle of Rivers and also an employee of the Respondent. Gaddis Rivers testified that upon reporting to work on October 13, he learned from another employee that Rivers was "being let go," and he thereafter proceeded to the personnel office where Rivers was meeting with Cheetham. There Gaddis Rivers, who was a union committeeman and steward, although he was not the steward for Willie Rivers' department, asked Cheetman if he could "sit in," and Cheetman told him that he could not.[6] He thereafter remained outside the office while the meeting with Willie Rivers continued in the office.

It was also the testimony of Willie Rivers that during the discussions in the office with Cheetham and the foremen another individual whom Rivers did not know at the time attempted to enter the meeting. The man was told that nobody was allowed to come in. Cheetham denied that anyone aside from Gaddis Rivers had sought to enter the office during the interview with Willie Rivers. That testimony was contradicted by an earlier sworn statement given the Board in early November during the investigation of the case in which he indicated Norman Siegfried, Rivers' steward, had stuck his head through the door and Cheetham had simply told Siegfried that he was not needed for that "particular problem," and Siegfried left. Cheetham impressed me as a generally truthful but confused witness. The contradiction by his prior statement adversely affects the reliability of his denial that Siegfried attempted to enter the discussions with Rivers. Accordingly, and because of Rivers' credible testimony that another individual aside from Gaddis Rivers did attempt to come in, I find that it was Siegfried who attempted to enter.

The Respondent denied that it had unlawfully denied any union representation rights to Rivers during the Oc-

[2] G.C. Exh. 2, art. I, sec. 4.

[3] G.C. Exh. 2, art. III, sec. 2.

[4] Progress reports for Rivers by two foremen, S. J. Obidzinski and Gilbert Jackson, for the weeks ending Octobert 1 and 8, 1978, were received in evidence and establish Respondent's dissatisfaction with Rivers' job performance.

[5] Cheetham in his testimony refers to a maintenance superintendent named Krupa. It is not clear from the record whether Krupa and Cooper are one and the same.

[6] Cheetham called as an adverse witness by the General Counsel testified he told Gaddis Rivers that Willie Rivers was not entitled to representation because he was still on probation.

tober 13 meeting, and argues that the established facts of the case do not bring it within the purview of *Weingarten*. More specifically, the Respondent contends that the meeting with Rivers was not investigative in nature and was called simply to announce to Rivers a predetermined decision to discharge him. In support of this contention Cheetham testified that on the morning of October 13, he discussed Rivers' job performance with Foremen Banks and Jackson and Maintenance Superintendent Krupa and it was determined that Rivers would be discharged for "unsatisfactory probationary period." It was only after that discussion that Rivers was called in, his job performance was discussed, and his termination announced.[7]

In the Respondent's view, the meeting with Rivers was a simple courtesy extended to him in order to explain the reasons for his discharge. The Respondent argues that it would be an "incredible distortion" of the Act to hold that the extension of such a courtesy to Rivers constituted a violation of the Act.

The Respondent also argues that the Union in agreeing to the contractual provision granting to the Company sole discretion in discharging probationary employees waived any *Weingarten* rights for probationary employees. In support of this contention the Respondent pointed out that it had had a similar provision in its collective-bargaining agreements for many years and the Union, consistent with the provision, had never filed a grievance or attempted to participate in any meeting regarding the termination of probationary employees.[8]

B. *Conclusion*

Approaching the Respondent's last argument first, I am not persuaded that the Union by agreeing that probationary employees could be discharged at the sole discretion of the Respondent thereby waived the *Weingarten* rights of such employees. A waiver will not be lightly inferred and must be shown by clear and unequivocal evidence. *Gary Hobart Water Corporation* v. *N.L.R.B.*, 511 F.2d 284 (7th Cir. 1975). The clear language to which the Union agreed in the instant case simply provides that probationary employees shall be subject to transfer, demotion, layoff, or discharge at the sole discretion of the employer. Under past practice, and in keeping with this provision, the Union filed no grievance with respect to the Respondent's transfer, demotion, layoff, or discharge of probationary employees.[9] But neither the clear language of the contractual provision nor the practice under it in anyway suggests a waiver of all rights of probationary employees whether such rights be statutorily founded or arise solely from the collective-bargaining agreement. The Board has long held that probationary employees are entitled to the same protections and rights under the Act as other employees. *Potlatch Corporation*, 236 NLRB 707 (1978); *Lafferty Trucking Co.*, 214 NLRB 582 (1974). Even the Respondent does not contend that by agreeing to the cited provision the Union waived all contractual or representation rights for probationary employees, for Cheetham conceded in his testimony that Rivers upon hiring was told, in effect, that he would have *all* contractual rights and union representation except for discharges within the probationary period. Moreover, and in any event, *Weingarten* rights are not inconsistent with the granting of sole discretion to the employer to decide on certain discipline. *Weingarten* rights attach prior to a decision on discipline.

If the Union waived anything through the agreement or by practice it was its right to protest though the grievance machinery the Respondent's determinations regarding transfers, demotions, layoffs, or discharges of probationary employees.[10] This falls far short of constituting a waiver of any *Weingarten* rights of probationary employees. Such rights involve representation of employees at interviews with management where the employee reasonably expects that any kind of discipline might follow, not just discipline involving transfers, demotions, layoffs, or discharges. Further, even where the discipline finally imposed as a result of such interviews involves a transfer, demotion, layoff, or discharge, the fact that the Union may be powerless to alter or reverse the discipline does not obviate its representative function, where requested, in attempting to insure that management's decision on the discipline is fairly reached with all pertinent facts considered.

Finally, *Weingarten* principles are based in part upon the recognition that a union in representing employees at meetings with management where discipline may be expected to result is safeguarding not only the involved employees' interests but also the interests of the entire bargaining unit when it exercises vigilence through such representation "to make certain that an employer does not initiate or continue a practice of imposing punishment unjustly." *Weingarten, supra* at 260, 261. Therefore, even assuming that the Union here had granted to the employer sole discretion with respect to the discharge of probationary employees, it may nevertheless serve the interests of other bargaining unit employees by attending, where requested, investigatory interviews between the Respondent and probationary employees which result in transfers, demotions, layoffs, or discharges. Accordingly, and on this record, I find and conclude that the Union

[7] In the absence of any contradictory evidence, and in view of prior performance evaluations on Rivers which were received in evidence showing problems with Rivers prior to October 13, I credit Cheetham's testimony that the decision to discharge Rivers had been made prior to the time he was called in. That the meeting was not called to ascertain any new facts regarding Rivers' performance and bearing on the the discharge decision is shown by Rivers' own testimony, which I credit, that Cheetham told him at the outset of the meeting that he was discharged. Moreover, Rivers also admitted that he was not asked a single question by anyone at the meeting. While Cheethan's testimony contradicted Rivers' as to the point in time in the meeting that the discharge was announced and whether any questions were asked, Rivers appeared to be more positive and emphatic in his testimony and, I believe, more reliable.

[8] Evidence supporting this contention is found in the testimony of William Lynch, the Respondent's former director of industrial relations. Such testimony was not contradicted and is credited.

[9] The fact as related by Lynch, that the Union had not previously sought to attend meetings between the Respondent and probationary employees, is meaningless in the absence of any showing that probationary employees had requested representation at such meetings or that *Weingarten* principles were applicable to such meetings.

[10] But even this is unclear from the agreement itself because the grievance machiney does not specifically exclude grievances of probationary employees for any reason.

did not either expressly or inferentially waive *Weingarten* rights of probationary employees.

There remains for consideration the issue of whether *Weingarten* principles may be appropriately applied to the Respondent's meeting with Rivers on October 13. The Board has applied *Weingarten* to any meetings with employees by employers where some discussion is had with the employee regarding the basis for discipline and discipline actually follows the discussion. See *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977), enforcement denied 587 F.2d 449 (9th Cir. 1978); *Alfred M. Lewis, Inc.*, 229 NLRB 757 (1977), enforcement denied in pertinent part 587 F.2d 403 (9th Cir. 1978); *Mt. Vernon Tanker Company*, 218 NLRB 1423 (1975), enforcement denied 549 F.2d 571 (9th Cir. 1977); *Columbia University*, 217 NLRB 1080 (1975), enforcement denied 541 F.2d 922 (2d Cir. 1976). On the other hand, the Board has held that if the meeting with the employee is simply to announce a decision previously reached by management on discipline or if the meeting terminates upon the employee's request for representation the employer does not violate the Act in denying the employee representation. See *K-Mart Corporation*, 242 NLRB No. 140 (1979); *Amoco Oil Company*, 238 NLRB 551 (1978); *United States Gypsum Company*, 200 NLRB 305 (1972).

I am persuaded in view of Obidzinski's warning to Rivers the week prior to October 13, that Rivers did have a reasonable expectation that the meeting of October 13, could result in some action detrimental to him. I am not convinced, however, that the meeting fell into the class of "discussion" or "interview" to which the right of union representation would attach under *Weingarten* even as interpreted by the Board in *Certified Grocers, supra*. In *Certified Grocers* the employer, having perviously decided upon disciplinary action, called the employee in and after denying the employee's valid request for union representation, discussed the employee's work record, commented negatively thereon, and announced the discipline imposed, a 2-week disciplinary layoff. A second request for representation was denied by the employer and further conversation followed prior to the conclusion of the meeting and the signing of the layoff notice by the employer. In the instant case, however, the Respondent had arrived at its decision on termination prior to the meeting as shown by Rivers testimony that the first thing said to him as he walked in was that he was being terminated. It is true that here, as in *Certified Grocers*, there was additional "discussion" or "conversation" regarding Rivers' work performance and Rivers without doubt attempted to defend, explain, or justify his performance, and even asked for a transfer as an alternative to discharge. However, his "discussion" and "conversation" appears to have been completely voluntary because, as he testified, he was not asked any questions about his work. It is difficult to perceive how Rivers' voluntary remarks and discussion could have unilaterally changed the complexion of the meeting from one called to announce and explain a discharge into one which may be regarded as investigatory or having a factfinding purpose to which *Weingarten* principles would clearly apply. The fact that the Respondent extended to Rivers' the courtesy of listening to him does not establish that it sought or elicited his remarks. In my opinion, a *Weingarten* violation, even under *Certified Grocers*, must turn on whether the employer in some manner seeks information from the employee after the request for representation is denied and not whether the employee supplies information. Under these circumstances, and while there was some discussion or dialogue in the meeting, I do not believe there was an "interchange" amounting to the type of "interview" involved or contemplated in *Certified Grovers*. As pointed out by the Respondent's brief the word "interview" is defined as a meeting or consultation for evaluation purposes or for obtaining information. The record here does not establish that the Respondent called the meeting with Rivers on October 13 for either of these purposes.

In addition, in my opinion, the conclusion of the Board in *K-Mart, supra*, is instructive, as to the absence of a violation here. There the employer had reached a decision on discharge prior to meeting with the affected employee. When the employee was called in he made a valid request for representation which was denied. The employee nevertheless was asked if he had anything else to say and he declined on the basis that it appeared the employer had already made up its mind. The employer agreed and announced the termination. The Board found the employer had not gone beyond informing the employee of disciplinary measures decided upon prior to the meeting and had not engaged in any other type of interchange which could be characterized as an "interview." To the same effect see *Texaco, Inc.*, 242 NLRB No. 60 (1979). If the question to the employee there as to whether he had anything further to say regarding the discipline after representation had been denied him did not establish a *Weingarten* violation it must follow that an employee's unsolicited remarks also cannot be regarded as an interchange or "interview" to which *Weingarten* would be applicable. Representation would have been no less useful to the employee in the *K-Mart* case in assisting him in saying whatever else he might want to say than it would have been to Rivers in making his unsolicited remarks in the instant case.

In any event, I believe that the instant case may be distinguished from *Certified Grocers*, for here Rivers' discharge was announced to him as he walked in the office. Regardless of whether the administrative paperwork had been completed or even initiated at that point Rivers ceased to be an employee as of the time of the announcement. The finality of that decision was underscored by the Respondent's "sole discretion" in making it. Therefore, he had no further *Weingarten* rights even though there was further "discussion" regarding the discharge. In *Certified Grocers* the discipline imposed was less than discharge and the employee status of the affected individual was never lost.

Considering the foregoing and even assuming a valid request by Rivers for representation at the October 13 meeting,[11] I find and conclude that the Respondent did

[11] While unnecessary in light of the conclusions reached above, I would find in agreement with the General Counsel's position that Cheetham by advising Gaddis Rivers in the presence of the Charging

Continued

not violate Section 8(a)(1) of the Act in denying union representation to Rivers as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. The Respondent did not violate Section 8(a)(1) of the Act by denying union representation to Willie R. Rivers, Jr., at the meeting with him on October 13, 1978, as alleged in the complaint.

Upon the basis of 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[12]

The complaint is hereby dismissed in its entirety.

Party that the Charging Party was not entitled to representation made any request by him for representation futile.

[12] 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.