

Allen's I.G.A. Foodliner and United Food and Commercial Workers International Union, Local 227, AFL-CIO.¹ Case 9-CA-12734-B

August 14, 1979

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On April 19, 1979, Administrative Law Judge Ralph Winkler issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

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 conclusions³ of the Administrative Law Judge and to adopt his recommended Order.⁴

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Rela-

¹ The name of the Petitioner, formerly Amalgamated Meat Cutters & Butcher Workmen of North America, Local 227, AFL-CIO, is amended to reflect the change resulting from the merger of Retail Clerks International Union with Amalgamated Meatcutters and Butcher Workmen of North America on June 7, 1979.

² Respondent 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.

³ The amended complaint alleged only Respondent's discharge of employee Adkins and its announcement of improved benefits and sponsorship and participation in the circulation of a petition withdrawing support from the Union to be unfair labor practices. The Administrative Law Judge found, in that portion of his Decision entitled "Adkins' union role," that Respondent engaged in other conduct including, *inter alia*, asking Adkins why he supported the Union and statements to him that he would be fired for "talking union," and that this conduct began in May 1977 and continued until Adkins' discharge in July 1978. In the section of his Decision entitled "Concluding findings" the Administrative Law Judge further found that this conduct was not alleged by the General Counsel to constitute unfair labor practices because it occurred prior to the 6-month limitation period prescribed by Sec. 10(b) of the Act. No exceptions were taken to this finding. However, inasmuch as the charge was filed in July 1978, in view of the Administrative Law Judge's finding that the conduct noted above occurred until the time of Adkins' discharge that same month, it is clear that not all of this conduct was outside the 10(b) period. Accordingly, we adopt *pro forma*, as to that conduct which occurred within 6 months prior to the filing of the charge, the Administrative Law Judge's finding that those incidents did not violate the Act.

⁴ We have modified the Administrative Law Judge's notice to conform with his recommended Order.

tions Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Allen's I.G.A. Foodliner, Morehead, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found, after a hearing, that we have violated the National Labor Relations Act. It has ordered us to post this notice and to keep the promises that we make in this notice.

WE WILL NOT discharge, lay off, or otherwise discriminate against employees to discourage, or because of, union activities.

WE WILL NOT grant or promise to grant any employment benefits for the purpose of undermining employees' support for United Food and Commercial Workers International Union, AFL-CIO.

WE WILL NOT sponsor any effort or participate in any respect in seeking to cause our employees to withdraw from the above-named Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to reinstate Lowell Adkins and make him whole for earnings lost since his discharge.

Our employees are free to join or remain members of United Food and Commercial Workers International Union, Local 227, AFL-CIO, or of any other union, or not to join or remain members unless such membership is required under a lawful contract under the Labor Management Relations Act.

ALLEN'S I.G.A. FOODLINER

DECISION

STATEMENT OF THE CASE

RALPH WINKLER, Administrative Law Judge: A hearing in this matter was held upon an amended complaint issued by the General Counsel and an answer filed by Respondent.

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

FINDINGS OF FACT

The 8(a)(1) allegations

I. THE BUSINESS OF RESPONDENT

Allen's I.G.A. Foodliner (hereinafter Respondent), a Kentucky corporation, operates two retail grocery establishments in Morehead, Kentucky. It meets the Board's applicable jurisdictional standards, and I find that it is an employer within Section 2(6) and (7) of the National Labor Relations Act, as amended.

II. LABOR ORGANIZATION INVOLVED

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Local 227 (hereinafter the Union), is a labor organization within Section 2(5) of the Act.

III. UNFAIR LABOR PRACTICES

Introduction

The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Lowell Ray Adkins and three other employees for union reasons, and that it also violated Section 8(a)(1) by other specified conduct. At the outset of the hearing the parties entered into a settlement agreement resolving the discharge allegations of the three other employees. The settled allegations were numbered Case 9-CA-12734-A; the remaining allegations were numbered 9-CA-12734-B. The General Counsel, in joining in the settlement agreement, reserved a right to adduce any evidence relevant and material to the remaining allegations.

The backdrop of this case is an organizational campaign begun by the Union in the fall of 1976 among Respondent's Morehead employees. An election on the Union's representation petition was held on January 20, 1977. The Union filed objections to the election which it had lost and, on March 25, 1977, a hearing was ordered on some of the objections. After a hearing the Hearing Officer issued a report sustaining the objections and recommending that a second election be conducted. The Regional Director sustained the Hearing Officer's recommendations in a Supplemental Decision on June 15, 1977, and a second election was conducted on August 12, 1977. The Union won this election. The Regional Director overruled objections filed by Respondent and issued a Certification of Representative to the Union on October 18, 1977.

On January 19, 1978, Respondent refused the Union's request for recognition and bargaining, and the Union filed a refusal-to-bargain charge on January 30, 1978. The General Counsel issued a complaint on February 24, 1978, and filed a Motion for Summary Judgment in that matter on March 14, 1978. The Board issued a Decision and Order on July 3, 1978, finding that Respondent had violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union as statutory bargaining representative. *Allen's I.G.A. Foodliner*, 236 NLRB 1342 (1978). The matter is awaiting argument in enforcement proceedings before the United States Court of Appeals for the Sixth Circuit (No. 78-1447).

Ivan Connolly is one of the Respondent's employees. On or about May 1978, while the aforementioned refusal-to-bargain case was pending before the Board, Connolly approached employee Paula Henderson during working hours. He handed her a typed document and asked that she read it. The typed document was to the effect, according to Henderson's uncontroverted testimony, that "if you wanted the union to stay out you was supposed to sign it down below." Several signatures were on the document at the time. Henderson testified that she was "really upset" and did not know whether to sign the document, and that she sought Assistant Manager Harold Chapman's advice about the matter. Chapman said that it would be "wise" to sign the document, and she signed it. One week or so later Connolly approached employee Donna Withrow with the same or a similar document. According to Withrow, the document stated that "we, the employees of Allen's IGA, do not wish to have the Amalgamated Meat Cutters represent us," and some signatures appeared thereon. Withrow refused to sign. A few days later Assistant Manager Wavell DeHart called Withrow to his office where he had the document lying before him. DeHart asked why Withrow had not signed, and she replied that she did not want anything to do with it and would wait until after a scheduled store meeting before making up her mind. DeHart said that it would be "too late then," and that it would be "better" if she signed at once. Withrow thereupon signed the document.

The day after the DeHart-Withrow incident Hubert Allen convened and addressed a meeting attended by Respondent's Morehead employees. Allen announced that he was going to institute a profit sharing plan for employees and raise their wages, and he stated that he would have instituted these changes sooner except that it could have gotten him into trouble. He "was glad it was all over now." Allen told the employees, and that the changes "could bring us all back together and we would be one big, happy family again."

Adkins' union role

Adkins, a clerk in the produce department in Respondent's west store, became active early on in the union campaign. He attended meetings, handed out union cards to other employees, otherwise solicited them to join the Union, during the period between the elections (January-August 1977), he assisted Union Business Agent Max Stuckwisch in arranging organizational meetings, and he also accompanied Union Representative Jerry Averly on organizational visits to employees' homes. Several months after the second election (August 1977), Adkins was elected shop steward and member of the Union's negotiating committee.

Hub Moore became manager of the west store in May 1977, some 3 months before the second election. On numerous occasions beginning in May 1977 and until Adkin's discharge in July 1978, according to Adkin's uncontroverted testimony, Moore called Adkins aside for private conversations. On these occasions Moore accused Adkins of "spreading lies" by telling employees he could get them improved wages and benefits; charged Adkins with "having more control over the employees than he [Moore] did";

asked Adkins why he supported the Union; told Adkins that he (Moore), would fire Adkins if he ever caught Adkins "talking union on the job or on company property"; and told Adkins that he (Moore), "had people in that store that would tell him [Moore] anything he wanted to know and anything that was happening."

Moore had called a meeting the meat and produce department during the period between the elections. He told the employees on that occasion that Respondent "had kept quiet long enough," and he announced a new benefit plan that he said Respondent wished to implement but could not do so at the time because "it might be considered bribery." Adkins inquired from the floor whether the plan was similar to an IGA plan in Louisville. Moore replied that the plans were similar, at least as to time and a half for overtime pay. Challenging Moore's statement at the meeting and asserting that the Louisville plan called for double overtime pay, Adkins then produced a copy of the Louisville plan to support his assertion concerning the overtime matter.

After the ballots were counted on the day of the second election Moore came through the produce department and angrily stated to Adkins and two other produce employees, "Well, I guess you all think you have won. Well, you didn't win. You lost." In the period following the second election Moore continued to single out Adkins as the principal spokesman for the Union. Moore chided Adkins that the latter "was costing the people of the store money . . . that they [Respondent] had a plan that would be improved benefits for the employees, but they couldn't put it into effect at this time because of the [Union] problem they had." Another time, when Moore berated Adkins about a prounion slogan on the wall of the men's restroom and accused Adkins of writing (Adkins denied doing so), Moore told Adkins that he wanted such matters to stop. On another occasion Moore told Adkins that he (Moore), "had a shop steward in Louisville that he had thrown out of his office more times than he could count. But that they finally made him an Assistant Manager . . ." (Adkins, it is recalled, had been elected a shop steward.) Shortly after the second election Moore expressed his displeasure to Night Manager Billy Snipes (purportedly a supervisor), over Snipes' prounion sympathies. Moore then suddenly inquired what Snipes and Adkins had been talking about in the parking lot a few days earlier. Snipes replied that they had been discussing the sale of a house. Moore told Snipes that he (Snipes), would be given another chance to keep his job as long as he realized that "you'll have certain people you can talk to and certain people you can't . . . you'll have to watch who you talk to at work here," and that Snipes should "stay away from the boys in Produce and around back."

Adkins is terminated

On April 7, 1978, Store Manager Moore notified Adkins that he was being laid off "due to lack of business" and because he "rated below" his fellow employees. Adkins had been in Respondent's employ since 1969 and had more seniority with Respondent than most of the employees retained. At the time of his layoff Adkins had been a produce clerk in Respondent's west store for 1 year, and before that he had purchased produce and had been a produce truck-

driver. Although Respondent did not call Moore as a witness, co-owner Allen testified that some layoffs were necessary because of a business decline brought about by a new competitor entering the area. Allen testified that Respondent laid off Adkins rather than less senior employees because of his comparatively poor "attitude" and work performance. Respondent has since hired new clerks in the produce department, and Allen asserted that Respondent did not recall Adkins for the same considerations that motivated his selection for layoff. Adkins was, in fact, discharged.

According to Allen, Adkins "never seemed happy back there when he was performing his work," and Allen testified that he had notice this unhappiness "mostly in the last couple of years." Allen also testified that Adkins engaged in "horseplay" on the job, that he reprimanded Adkins for reading a newspaper on several occasions, and that two or three times he spoke to Adkins about the latter's body odor. Allen admittedly had never mentioned that purported "unhappiness" to Adkins, and Adkins credibly testified that he had never been reprimanded or otherwise cautioned that his work performance was unsatisfactory or below standard. Neither Store Manager Moore nor any other store supervisor who had daily and immediate contact with Adkins on the job was called by Respondent to support Allen's purported views of Adkins.

Allen was asked whether he had consulted with Moore or Assistant Manager Ted Beckman in deciding whom to lay off. Allen replied that he had discussed the matter with them but could not remember "what the discussion was." When then asked whether Moore and Beckman had made any recommendations in that connection, Allen replied that it was he and not they who recommended Adkins' layoff. Respondent called neither Moore nor Beckman to corroborate Allen.

Concluding findings

Assuming that Respondent had an economic reason for some retrenchment, this record preponderantly establishes that Respondent terminated Adkins because of his union role and not for the reasons asserted by it. Respondent plainly considered Adkins the in-house union leader, and it waged its own campaign of harassment against him because of that leadership role. Adkins was a longtime employee, and I find no credible testimony that his performance was deficient in any respect, on a comparative basis or on any other basis.

Uncontroverted evidence shows that Respondent continued its efforts to undermine the Union even after the Union's certification. The undenied conduct of Manager Moore respecting Adkins and of Assistant Managers Chapman and Dehart as to the petition in April and May 1978 while Respondent was challenging that certification before the Board are examples. Without discussing other evidentiary support submitted by the General Counsel, I find that Respondent terminated Adkins to rid itself of the individual it considered to be the principal employee spokesman for the Union.

Respondent does not even claim in its brief that the announcement of increased wages and benefits and its sponsorship and circulation of the antiunion petition were not

violations of the Act. However, it contends that the allegations as to those matters are barred by Section 10(b) of the Act. Respondent thus urges that the charge in this matter alleged discriminatory discharges only, and that "no general 8(a)(1)" violation was alleged (Resp. Br., page 8). The 8(a)(1) allegations in the complaint are, Respondent further claims, unrelated to the discharge allegations and therefore unsupported by a charge.

The charge in this matter was served on July 11, 1978. It alleged the discriminatory discharge of Adkins and two other employees on or about April 7, 1978, and also alleged that by the discriminatory discharges "and other acts" Respondent, in the language of Section 8(a)(1), "has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act." [Emphasis supplied.] The complaint, issued on August 16, 1978, alleged the discriminatory discharge of Adkins and three other employees on April 7, 1978; an amendment to the complaint, issued on February 2, 1979, added the questioned 8(a)(1) allegations concerning Chapman's and DeHart's April 1978 conduct as to the petition and Allen's May 1978 conduct as to increased employment benefits.

The charge on its face is sufficient to support the allegations in question. The 8(a)(1) conduct in question is, moreover, plainly related to Adkin's contemporaneous discharge, as together they constitute an effort by Respondent to unseat the Union. For these reasons, I reject Respondent's 10(b) contention. See *Fremont Hotel, Inc.*, 162 NLRB 820 (1967); *N.L.R.B. v. Braswell Motor Freight Lines, Inc.*, 486 F.2d 743, 745-746 (7th Cir. 1973). However, various incidents set forth above did occur before the 10(b) period and are barred by that provision, and it is for that reason that the General Counsel did not allege and I do not find unfair labor practices as to them.

CONCLUSIONS OF LAW

1. Respondent is an employer within Section 2(6) and (7) of the Act.
2. The Union is a labor organization within Section 2(5) of the Act.
3. Respondent discharged Adkins in violation of Section 8(a)(1) and (3) of the Act.
4. Respondent further violated Section 8(a)(1) of the Act by announcing improved benefits in order to undermine the Union and by sponsoring and participating in the circulation of a petition withdrawing support from the Union.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action, including reinstating and making whole Adkins in order to effectuate the policies of the Act. All backpay computations shall be in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).¹

¹ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), enforcement denied on other grounds 322 F.2d 913 (9th Cir. 1963).

The General Counsel requests that interest of 9 percent should be awarded. That, however, is a matter for the Board to decide, and I am meanwhile bound by its current policy.

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:

ORDER²

The Respondent, Allen's I.G.A. Foodliner, Morehead, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off, discharging, or otherwise discriminating against employees for activities in behalf of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other union.

(b) Sponsoring or participating in the circulation of petitions or otherwise engaging in efforts to cause employees to withdraw support from the aforesaid Union.

(c) Granting or promising to grant any employment benefits for the purpose of undermining employees' support for the Amalgamated Meat Cutters.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under the Act.

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

(a) Offer to Lowell Ray Adkins reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole as set forth in "The Remedy" section above, for any loss of earnings suffered as a result of the discrimination against him.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

(c) Post at its stores in Morehead, Kentucky, copies the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

² 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.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."