American Cyanamid Company *and* Jerry L. Primm *and* Thomas G. Little. Cases 9-CA-11918-2 and 9-CA-11918-4

November 22, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

On July 17, 1978, Administrative Law Judge James L. Rose 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 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,[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 Respondent, American Cyanamid Company, Willow Island, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] 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.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on April 13 and 14, 1978, at Parkersburg, West Virginia, upon the General Counsel's complaint which alleged that Thomas G. Little was discharged on May 23, 1977,[1] (the discharge being subsequently reduced to a 30-day suspension) in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

Respondent contends that its discharge of Little was justified because of his picket line misconduct on the evening of May 9 and early morning of May 10, and that, in any event, the complaint should be dismissed because the discharge was reduced to a 30-day suspension pursuant to a strike settlement agreement approved by the Union and its membership.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Respondent is a Maine corporation engaged in the manufacture and wholesale distribution of chemical and other products at various facilities throughout the United States including one at Willow Island, West Virginia, the facility here involved. In the course and conduct of its business, Respondent annually sells and ships goods valued in excess of $50,000 from its Willow Island facility directly to points outside the State of West Virginia. Respondent admits, and I find, that it is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Oil, Chemical and Atomic International Union, AFL-CIO-CLC, Local 3-499 (herein the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Background Facts*

For a number of years the Union has represented a unit of Respondent's approximately 500 production and maintenance employees. Respondent and the Union have had successive collective-bargaining contracts, the last one preceding the events involved in this matter expiring at midnight on May 9.

Following intensive negotiations, Respondent presented the Union its final offer on the afternoon of May 9, which ultimately was rejected by a vote of the union membership, and it was determined to strike.

While the strike was officially to have commenced at midnight, May 9, during the hour or so prior to that, and following the union meeting, employees began to gather at the gates to Respondent's plant. Thus, prior to midnight, there was some picket line activity including building bonfires, yelling and whopping by strikers, throwing beer cans, bottles, and debris on company property, and some picketing. The security supervisor of the plant was physically stopped when he attempted to leave the premises. Also during this period, the telephone cable to Respondent's plant was cut, and throughout the night numerous acts of misconduct occurred, including pelting the administration

[1] All dates refer to 1977 unless otherwise indicated.

building near the main gate with rocks and small lead balls shot from a slingshot. Ultimately, the picketers numbered about 200. They built at least five fires near the various plant entrances, including three at the main entrance, one on either side, and one in the middle.

Respondent determined to keep operating, and early in the evening of May 9 began to call in salaried employees to do production work. Also Respondent contacted the West Virginia Highway Patrol. Two troopers arrived about 11:30 p.m. Others were contacted and ultimately there were about 50 state troopers at the Company's premises who stayed on until about 4 p.m. on May 10, at which time a state court of general jurisdiction issued some type of an injunction against certain activity engaged in by the strikers.

About 3:15 a.m. on May 10, Thomas Little, the Charging Party, along with two other strikers, Kenneth Winland and Jerry L. Primm,[2] were arrested by state troopers, handcuffed to a railing near the administration building for about 45 minutes, and then driven to a local jail where they were booked and incarcerated. Little was charged with "public drunkenness" and "obstructing an officer." He pled *nolo contendre* to these charges, paid a fine of $66, and was released from jail.

On May 23, Little, along with other strikers (including Wineland and Primm), was notified by the Company that he had been discharged for unspecified acts of picket line misconduct.

This misconduct, according to the testimony of Donald C. Wagner, industrial relations associate at Respondent's Willow Island plant, was:

> Well, Mr. Little was observed as one of the conspicuous picketers on the picket line along State Route 2. He was obvious conspicuous by his activities of moving in and around throughout the—along the highway; along the picket line. He was instrumental in assisting and bringing in wood and in starting fires in the middle of entrances. He assisted there as picketers struck up fires; built fires right in the middle of entrances at times when the Company was in a situation where we needed to be able to exit and enter the company property. He was observed participating in the activities of throwing things on company property; whooping up and yelling and generally helping to incite the whole riotous situation.

In addition, Wagner testified that a reason for Little's discharge was the fact that he was arrested on the morning of May 10.

Tracking the testimony of Wagner, counsel for Respondent in his brief argues that Little was discharged because he was one of the more conspicuous strikers; he threw rocks and debris at company buildings; he participated in blocking the main entrance by being present and by assisting in maintaining a large bonfire; he was seen with Kenneth Winland who was observed to have engaged in picket line misconduct and who was also discharged; he was observed shooting pellets at the building; and he had been charged with public intoxication and resisting an officer.

As will be detailed more full *infra*, Little generally admits to having been present from time to time on the picket line during the early hours of May 10 but denies having engaged in any of the misconduct attributed to him by Respondent. He admits being in the presence of Winland from time to time and admits that he was in fact arrested. He denied, however, throwing anything on company property and specifically denied that he had in his possession, or shot, lead pellets at the buildings.

B. *Analysis and Concluding Findings*

Initially, Respondent contends that inasmuch as Little's discharge was converted to a 30-day suspension the case ought to be dismissed. The fact that Respondent mitigated its discipline of Little has no bearing on whether it was unlawful. Such affects only The Remedy. Thus, if Respondent violated the Act by disciplining Little because of his picket line activity, such was unlawful whether the sanction was a discharge or merely a 30-day suspension. *MP Industries, Inc.*, 227 NLRB 1709 (1977). And the fact that the Union may have agreed to the suspension of Little as part of the strike settlement agreement neither disproves the allegation nor would it affect The Remedy if, in fact, the discipline of Little violated the Act. The cases relied on by Respondent do not involve an agreement purporting to settle a previously committed unfair labor practice.

United Aircraft Corporation (Pratt & Whitney Division), 192 NLRB 382 (1971), involved an agreement concerning the reinstatement rights of economic strikers. The alleged discrimination was in cutting off employment preference rights of certain strikers pursuant to the settlement agreement. The Board concluded that such an agreement was not unreasonable, and given all the facts and circumstances it ought to be accepted by the Board as a matter of policy. The agreement did not purport to remedy any unfair labor practice occurring during the strike. Similarly, in *Western Steel Casting Company*, 233 NLRB 870 (1977), where the criteria of *United Aircraft* are met, the Board will accept "a valid and enforceable recall agreement and [as] a clear and unmistakable waiver of strikers' rights to any jobs except those to which they would be eligible [under the agreement]." Again, the recall agreement did not purport to settle any alleged unfair labor practice. *Suburban Transit Corp.* v. *N.L.R.B.*, 536 F.2d 1018 (3d Cir. 1976), cited by Respondent, is also inapposite. In that matter the court held, contrary to the Board, that the grievance the striking employees sought to resolve was covered under the contractual grievance procedure, thus the strike was prohibited by the no-strike clause. As has long been recognized, a labor organization can contractually waive employees' right to strike. *Mastro Plastics Corp., and French-American Reeds Mfg. Co., Inc.*, v. *N.L.R.B.*, 350 U.S. 270 (1956). It does not follow, nor did the court hold, that a union may waive an employee's right under the Act to have his employer's unfair labor practice remedied.

The criteria by which the Board will defer to a private settlement of an unfair labor practice are set forth in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

[2] Primm was the Charging Party in Case 9-CA-11918-2, which has been dismissed upon the request of Primm to withdraw the charge and the agreement of the General Counsel to dismiss the complaint.

None of those criteria appear to have been met here, particularly the requirement that the resolution be not clearly repugnant to the Act. If, in fact, the discipline of Little was unlawful, to let it stand unremedied is clearly repugnant.

Turning now to the merits, it is well settled that where an employer disciplines an employee because he has engaged in an economic strike, such violates Section 8(a)(3) of the Act. This may be defended by a showing of a good-faith belief that the employee was guilty of sufficient misconduct to render him unemployable. If the respondent is able to meet this burden, then the General Counsel must come forward with evidence to deny that the employee did what he was claimed to have done and/or that the activity was not sufficient to justify his discharge. The burden would then return to the respondent to rebut such denials. *Rubin Brothers Footwear, Inc., and Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952).

The mere fact that there was substantial misconduct engaged in by some strikers does not impute culpability to Little. Whether he lost protection of the Act depends upon his specific conduct and not that of others. Thus,

> Each striker's eligibility for reinstatement must be judged solely upon incidents in which the striker in question is alleged to have participated. Unauthorized acts of violence on the part of individual strikers are not chargeable to other union members in the absence of proof that identifies them as participating in such violence.[3]

The question here is whether the acts engaged in by Little on the morning of May 10 were sufficiently egregious to deny him continued protection of the Act, or should be categorized as "a trivial rough incident or a moment of animal exuberance." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

Finally, even though Respondent's discharge of Little may have been prompted by believed picket line misconduct, such does not relieve Respondent from liability for having committed an unfair labor practice if it is found that his acts were not of sufficient gravity under all the facts and circumstances. *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975).

Here, I conclude that Respondent has not established that Little engaged in sufficient misconduct so as to justify its initial discharge of him on May 23, or the lesser discipline of a 30-day suspension. Respondent established only that Little was on the picket line and was at times near Winland who apparently was a leader in picket line misconduct. Little had the misfortune to be standing near Winland when it was determined by the highway patrolmen, for reasons unspecified on the record, to begin arresting strikers. It appears from the testimony of Trooper Lake that Little was arrested because he was there. The fact of his arrest was duly noted in Respondent's strike log, and this, I believe, was how Respondent later identified Little as being one of those to discipline.

Little testified that he was at the picket line on two occasions for a few minutes shortly prior to midnight and returning in the vicinity of 2:30 a.m. Although Wager testified to having seen Little in and around the picket line throughout the early hours of the strike, that Little was there only on the occasions to which he testified, and for a short time at that, was not really rebutted by Respondent. I credit Little.

The specific contentions of Respondent, I conclude, are neither singly nor together sufficient to deny Little protection of the Act. Wagner testified that Little was "one of the conspicuous picketers." But this identification, as indicated, I believe, was a result primarily of Little having been one of those arrested. In any event, the fact that he was seen on the picket line or was even "conspicuous" does not imply that he engaged in strike misconduct. This, therefore, clearly is not a sufficient reason to deny him the protection of the Act.

Wagner also testified that he saw Little assisting in bringing wood from a dark pickup truck. While Little denied that he did this, a denial which I tend to credit in view of the fact that Wagner's observation necessarily was of questionable reliability because of the circumstances (night and distance) nevertheless, the mere fact that Little was carrying wood certainly is not picket line misconduct. Respondent in this regard appears to argue that because the picketers built three bonfires, one on either side and one in the middle of the main entrance to the plant, the strikers thereby physically restrained ingress and egress, for which they could be disciplined. Respondent further argues that since Little was seen unloading some of the wood he is responsible for this activity.

Although Wagner testified that the fire "made it completely impossible . . . for one to drive an automobile or truck to the main entrance," I do not believe that such was the case or that such has been established. Obviously, there was ingress and egress to the plant property, particularly of the 50 or so highway patrolmen who arrived after the fires were built. It is certainly not inevitable that three fires at a main entrance to the plant would be so large as to physically stop all vehicles. There is testimony that Respondent's chief of security attempted to leave the premises and was restrained from doing so, inferentially by the fires. But Wagner testified further that his truck was pelted with rocks.

From the totality of the record, I cannot conclude that there was such a wall of fire so as to restrain totally ingress and egress. On the other hand, it was a very cold night and the possibility that picketers would build bonfires to keep warm does not seem either unreasonable or beyond the bounds of permissible picket line conduct. While building a fire in the middle of the roadway may not have been proper and should not be condoned, it nevertheless does not seem to be particularly serious. Thus, even if Little had participated in building fires, such would not be sufficient to deny him protection of the Act.

Wagner testified, and Little denied, that Little threw bottles and debris upon company property and caused some unspecified damage. Again, even if he did such acts, while not to be condoned, certainly are not particularly serious.

[3] *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973), where an additional factor considered in determining whether the particular act of misconduct was sufficient to deny reinstatement was the company's unfair labor practices which had provoked the strike. Here, the strike was economic. Nevertheless, the Board's conclusion that not every act of misconduct strips from the employee the protective mantle of the Act is equally applicable.

Such would not be reason to discharge or discipline an individual absent some evidence at least that there was damage to persons or property, of which there was none. Accordingly, this is not a sufficient reason for the Respondent to have disciplined Little.

Respondent contends that Little was involved in shooting lead pellets with a slingshot. There is no direct evidence that he did this, although company witnesses did testify that lead pellets were shot and, in fact, some of the company officials in the administration building were hit by them. Winland was actually observed firing the pellets with the slingshot but Little was not. Respondent, however, asks that I infer that Little was engaged in this activity because when he was arrested the highway patrolman who searched him found a handful of lead pellets. I reject this inference.

Trooper Lake testified that he and two other police officers, probably another highway patrolman and a member of the sheriff's department, searched and booked Little, Primm, and Winland following their arrests. Lake testified that he searched Winland and he believes the other highway patrolman searched Little. Lake testified that during the course of this event, the other highway patrolman showed him a handful of lead pellets and said, "Look what I took from this boy here." While this testimony was received, in the fact of Little's credible denial that he had pellets on his person, I find the weight to be given it insubstantial. I conclude that it was not established that Little in fact had pellets. Beyond that, the mere fact that Little may have had lead pellets in his pocket does not prove, except by inference, that he shot pellets at anyone or, if he shot them, did any physical or property damage. Accordingly, I cannot conclude that Little should be denied reinstatement because of shooting lead pellets at company property.

Finally, Respondent contends that Little was disciplined because he had been arrested. The fact of his arrest, however, does not prove that he engaged in picket line misconduct. Indeed, it appears that Little was arrested for public intoxication, at best a vague and subjective complaint, as well as "obstructing an officer," also a vague and subjective complaint. In this respect Officer Lake did not testify to what Little was supposed to have done that amounted to obstruction of him nor did he offer any evidence that Little was in fact intoxicated. In any event, assuming without concluding that Little was properly arrested for the charges indicated, such does not amount to picket line misconduct and certainly is not the type of activity for which one should properly be disciplined.

It may very well be that the situation on the morning of May 10 was sufficient to cause the Respondent concern and to justify requesting the presence of 50 highway patrolmen. It may very well be that the situation was sufficient to justify injunctive relief. Nevertheless, these facts do not mean that Respondent was at liberty to discipline anyone whom it identified on the picket line unless that individual had actually engaged in serious acts of misconduct. Here, I find the evidence brought forth by Respondent to be insufficient to prove that Little in fact engaged in any acts of misconduct, much less acts so serious as to deny him protection of the Act. Accordingly, I conclude that when Respondent discharged Little on May 23, it did so in violation of Section 8(a)(3) and (1) of the Act. This unfair labor practice of Respondent has not been remedied in any respect by the fact that in the strike settlement agreement it had reduced the discharge to a 30-day suspension.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The unfair labor practice found is an unfair labor practice affecting commerce and the free flow of commerce and tends to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that Respondent discharged Thomas G. Little in violation of the National Labor Relations Act, but has subsequently reinstated him without prejudice to his seniority or other rights and benefits, I shall order that Respondent make him whole for any loss of wages or other benefits to which he may be entitled as a result of the discrimination against him, with interest, as provided by *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977),[4] and expunge from his personnel record all reference to the discharge and/or suspension.

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

ORDER [5]

The Respondent, American Cyanamid Company, Willow Island, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, suspending, or otherwise disciplining employees who engage in protected concerted activity, including an economic strike and picketing.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make whole Thomas G. Little for any losses that he may have suffered as a result of the discrimination against him in accordance with the provisions of the "The Remedy" section above.

(b) Expunge from the personnel record of Thomas G. Little any reference to his discharge on May 23 or to his subsequent suspension.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all pay-

[4] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[5] 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.

roll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Willow Island, West Virginia, facility copies of the attached notice marked "Appendix." [6] 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 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 said notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint in Case 9–CA–11918–2 be dismissed.

[6] 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."

APPENDIX

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

After a hearing at which all parties had the opportunity to present evidence, examine and cross-examine witnesses, the National Labor Relations Board has found that we have violated the National Labor Relations Act and we have been ordered to post this notice and to comply with its terms.

WE WILL NOT discharge, suspend or otherwise discriminate against our employees because they engage in a strike, picketing, or other activity protected by Section 7 of the National Labor Relations Act.

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 rescind the discharge and/or suspension of Thomas G. Little and make him whole for any losses he may have suffered as a result of the discrimination against him.

AMERICAN CYANAMID COMPANY