

Amoco Oil Company and Louis Nunn. Case 13-CA-17016

September 27, 1978

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On May 11, 1978, Administrative Law Judge Ralph Winkler issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed exceptions, a supporting brief, and 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 had considered the record and the attached Decision in light of the exceptions and briefs¹ and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge, relying on our Decision in *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977), found that Respondent violated Section 8(a)(1) of the Act when it denied the request of Charging Party Louis Nunn for union representation at a disciplinary interview held on October 31, 1977.² In its exceptions, Respondent contends, *inter alia*, that no disciplinary interview was actually conducted on that date and that the Administrative Law Judge erred in concluding that the result reached in *Certified Grocers* is determinative of the issues herein. We agree.

On Friday, October 28, employees Nunn, Curtis Daniels, and Carl Wilkerson were directed by Supervisor Peter Rizzo to report to the office of Superintendent Steve Gadus for the purpose of being interviewed with respect to allegations by Rizzo that they had violated established plant work rules by their presence in an unauthorized area. As found by the Administrative Law Judge, Nunn participated in the interview with Gadus and presented his own account of events related to the charge against him, without at any time requesting union representation. At the end of the interview, Gadus told Nunn that the matter would be further investigated and he would inform him on Monday (October 31) as to what action would be taken. Gadus, following usual company procedures, then prepared a memorandum on the incident

which he forwarded to Paul Monastyrski, a supervisor whose duties encompassed labor relations and personnel matters.

On the morning of October 31, Monastyrski reviewed Gadus' memo and the personnel files of the three employees involved. He then had a discussion on the matter with Gadus, at the end of which they both agreed that Nunn and Wilkerson should be given indefinite suspensions,³ and that Daniels—because of his status as a casual employee—should be terminated.

Late in the afternoon of October 31, Nunn was again directed to proceed to Gadus' office. When Nunn and Gadus met, Nunn immediately requested that a union representative be called. Gadus replied that he would send for a union representative when he was finished talking with Nunn. But Nunn persisted, stating that he would not talk with anyone without first seeing a union representative. Gadus then terminated the conversation by informing Nunn as follows: "I'll make it short and simple, you are suspended as of 4 p.m. indefinitely; if and when you return to work you will receive a white slip."⁴ Then, in accord with Gadus' direction, another Respondent official immediately notified the Union of Nunn's suspension and his request for representation.

Since the decision of the United States Supreme Court in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), it has been well established that an employee has a statutory right to refuse to submit without union representation to an interview which he reasonably fears may result in his being disciplined, as such right inheres in the Section 7 guarantee of the right of employees to act in concert for mutual aid and protection. However, the existence of such employee rights does not impose upon employers the absolute obligation to comply with all requests of that nature. For, if an employer does not wish to conduct that type of interview with a union representative present, it may exercise the option of dispensing with the interview altogether. Similarly, if an employee's request for union representation is rejected, he has the option either to dispense with the interview and any benefits such interview might confer on him or to proceed with the interview without representation.

³ It appears from the record that Respondent maintains what it terms a "progressive discipline" policy under which—once it is determined that an employee's offense, in light of his overall personnel record, so warrants—an indefinite suspension is imposed. Then, at a later date, higher supervisory authority and the Company's employee relations division determine the length of that suspension on the basis of their view of fairness and uniformity of application. No issue was raised in this proceeding with respect to the length of suspension eventually meted out to Nunn.

⁴ The record establishes that Respondent's usual procedure is to effectuate a suspension orally and later give the concerned employee a white slip (setting forth the infraction and discipline in writing) only when and if the employee returns to work.

¹ The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and briefs adequately present the issues and the positions of the parties.

² All dates hereinafter are in 1977, unless otherwise indicated.

Here, in our view, Superintendent Gadus lawfully exercised his option to dispense with the interview which he had apparently desired. According to the testimony credited by the Administrative Law Judge, after Nunn's repeated insistence upon union representation, Gadus confined himself to a single sentence informing Nunn of his suspension; he made no attempt to question him, engage in any manner of dialogue, or participate in any other interchange which could be characterized as an interview.

We regard *Certified Grocers, supra*, as inapposite because there the respondent employer—after refusing its employee's request for the presence of a union shop steward—proceeded nevertheless with the planned interview, discussing the employee's work record and commenting negatively thereon. The employee then renewed his request for the shop steward, it was again denied, and, thereupon, disciplinary sanctions were imposed and further conversation ensued. Here, by way of contrast, Superintendent Gadus effectively acquiesced in Nunn's wholly proper refusal to submit to the interview without union representation by dispensing with the interview entirely. He then simply informed Nunn of the Company's previously reached disciplinary decision—a determination partially based on the October 28 investigatory interview at which no request for union representation was made.

Our inquiry on the issues raised by this case does not, however, end at this point, for a violation of Section 8(a)(1) would nevertheless be established if there was substantial record evidence that Nunn was disciplined or otherwise disadvantaged because he sought union representation, or for the purpose of discouraging him or other employees from seeking such representation in the future.⁵ But the credited record testimony shows only that Nunn was suspended in accord with a management decision reached prior to his demand for representation; the same disciplinary action for the same offense was meted out against employee Wilkerson, and Respondent's later determination as to the length of Nunn's suspension has not been attacked on the basis of its fairness or alleged to have been based on considerations relating to his request for union representation.

In view of the foregoing, we conclude that substantial evidence in the record as a whole fails to sustain the General Counsel's burden of proving that either Respondent's denial of the Charging Party's request for representation or the disciplinary action taken against him was, under the circumstances herein, violative of Section 8(a)(1) of the Act. Accordingly, we shall order that the complaint be dismissed in its entirety.

⁵ Cf. *United States Postal Service*, 237 NLRB No. 169 (1978).

ORDER

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

DECISION

STATEMENT OF THE CASE

RALPH WINKLER, Administrative Law Judge: Hearing in this matter was held on March 23, 1978, upon a complaint issued by the General Counsel on December 9, 1977, and an answer filed by Respondent. There are no jurisdictional questions, and all parties agree that Respondent Amoco is an employer within Section 2(6) and (7) of the Act and that Oil, Chemical and Atomic Workers Union, Local 7-1, Ind. (herein called the Union) is a labor organization within Section 2(5) of the Act.

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

FINDINGS OF FACT

The Unfair Labor Practices

The complaint alleges that Respondent denied employee Louis Nunn's request for a union representative during a disciplinary interview on October 28, 1977, and that Respondent changed a disciplinary warning to a suspension 3 days later because Nunn requested union representation at a second disciplinary interview on the latter date. At all material times, Respondent and the Union have been parties to a collective-bargaining agreement containing grievance procedures.

October 28 Events

The issues in this case arose out of an incident on October 28, 1977, when three employees (Nunn, Curtis Daniels, and Carl Wilkerson) were purportedly¹ found taking a break in an unauthorized area in violation of an established plant rule. Supervisor Peter Rizzo (planner for construction) thereupon instructed the three men to follow him to his trailer office, and they did so together with Foremen Timothy Romans and John Williams. The employees were then accompanied one at a time to the trailer of Superintendent Steve Gadus where Gadus interviewed them separately respecting the aforementioned incident.

Nunn testified that while he and the two other employees were in Rizzo's trailer, he said to Rizzo, "why isn't the [union] rep here," and that Rizzo replied, "just wait here, don't get upset" and that "Gadus wants to talk to you." Nunn further testified in effect that while being interviewed by Gadus in Rizzo's presence, he asked Gadus for union

¹ As I advised the parties at the hearing, this case does not require a determination respecting the merits of the "break" matter. Hence, the "purported."

representation and that Gadus, in effect, ignored the request and continued the interview until he [Nunn] said he would refuse to say anything further without a union representative. By this time Gadus had interviewed the three employees and Gadus remarked to Rizzo that the men had told different stories of the incident. Gadus told Nunn, and apparently the two other employees, to return to work and that he would investigate further and let them know on Monday (October 31) what action he would take.

Gadus and Rizzo each denied that Nunn had requested or even mentioned union representation on October 28. Foreman Romans testified that he was with Nunn and Rizzo in Rizzo's trailer during the entire period until Nunn went to Gadus' trailer and that Nunn did not request a union representative, and Foreman Williams testified that he was present or in the vicinity during part of that period and heard no such request. Andy Pavlo is president of the Local Union and an International representative; James Smith is secretary and treasurer of the Local Union. Pavlo and Smith later became involved in this matter when Nunn was subsequently suspended and in connection with this hearing. While discussing this case in a Mr. Stepich's office several days before this hearing, according to Smith's testimony, Pavlo or Smith said that the Union had no "concrete evidence" that Nunn had requested union representation on October 28. And despite the fact that Nunn testified that "we" (the three employees together in Rizzo's trailer) had requested a union representative of Rizzo, neither of the two other employees was called to corroborate Nunn's testimony in this regard. Nunn testified that after leaving Gadus' trailer on October 28, he did not call the union hall to speak with a union representative until after a second meeting with Gadus on October 31. On the basis of demeanor and testimony of all witnesses, I credit the October 28 accounts of Rizzo, Romans, and Gadus and find that Nunn neither requested nor mentioned union representation on that date.

Subsequent Events

On October 28, after interviewing Nunn and the two other employees, Gadus prepared a memorandum on the matter and he delivered a copy of the document to Paul Monastyrski, a supervisor in the maintenance and engineering administration department. The latter's duties include personnel matters and labor relations. On October 31, Gadus and Monastyrski discussed the memorandum and the personnel records of the affected employees and what disciplinary action should be taken. Although Gadus is authorized to suspend employees and is not bound by Monastyrski's recommendations in such matters, Gadus discussed the matter with Monastyrski pursuant to a plant practice of "progressive discipline" involving consideration of such factors as "uniformity and fairness" in disciplinary situations. The record shows that, upon reviewing the matter on October 31 in light of these considerations, Monastyrski recommended to Gadus that both Nunn and Wilkerson should be suspended indefinitely and be given white slips on return to work and that Daniels—because he was a casual employee—should be discharged. The record further establishes that Gadus agreed at that time that this was the ap-

propriate resolution of the matter and that he would effectuate that decision.

Respondent's practice respecting suspensions and the like is to call affected employees to the disciplining supervisor's office—Gadus in this case—and notify them orally of the disciplinary decision. Gadus followed this procedure with all three employees, and on October 31, after the Gadus-Monastyrski discussion, Nunn was instructed by Rizzo to report to Gadus at the latter's trailer.

As in the case of the October 28 incident, there is a credibility conflict concerning what happened after Nunn's arrival at Gadus' trailer on October 31. The parties agree, in effect, that Nunn told Rizzo on that occasion he would not talk with anyone without a union representative and that Rizzo replied that Nunn had not made such request earlier. Gadus, entering the trailer at the time, heard this exchange between Nunn and Rizzo. Nunn testified that Gadus thereupon told Nunn that he "was going to give you a white slip but since you are so damned smart [in refusing to talk without a representative] I will suspend you" and that Nunn could get a union representative outside the gate. Gadus, corroborated by Rizzo, denied these statements attributed to him by Nunn. Gadus testified that he told Nunn he would get Nunn a union representative after talking to Nunn and if Nunn had a grievance. (Respondent's contract with the Union provides that an employee having a grievance is entitled to a union representative.) Gadus then said he would make it "short and simple" and, also according to his testimony, Gadus told Nunn he was suspended indefinitely and "if and when you return to work you will receive a white slip." (It is uncontradicted that Gadus notified Wilkerson to a like effect that same day.) Gadus thereupon gave instructions, which were immediately followed, to notify the Union of Nunn's suspension and of the latter's request for a union representative.

Although Gadus testified it was a "possibility" that Nunn might have been able to talk Gadus out of the suspension, and in context I am satisfied that this was only a theoretical possibility, he testified that the only purpose for summoning Nunn was "to give him discipline." Monastyrski testified, in effect, that as a practical matter under the circumstances and under applicable standards of "progressive discipline," Gadus had no discretion to withhold the suspension from Nunn and Wilkerson.

Both Nunn and Wilkerson thus received indefinite suspensions and the record shows, without contradiction, that white slips are issued only when a suspended employee returns to work. The record also shows that the length of an indefinite suspension is not determined until a later time and, then, by higher management.

I find, as all parties agree, that Gadus did deny Nunn's request for union representation on October 31, but, contrary to the complaint, I find that the record does not establish that Gadus changed a disciplinary warning to a suspension because of Nunn's request.

The "Certified Grocers" issue

Although the complaint does not specifically allege that Respondent violated the Act by denying representation to Nunn on the occasion of Nunn's suspension on October 31,

the parties litigated and briefed that issue and I therefore deem it within the purview of this case.

In *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), "the Supreme Court held that it is an 8(a)(1) violation for an employer to deny an employee's request that a union representative be present at an investigatory interview which the employee reasonably fears [may lead to] disciplinary action" (*Glomac Plastics, Inc.*, 234 NLRB 1309 (1978)). Unlike *Weingarten*, however, the October 31 incident did not involve an investigatory interview, for by that time Gadus had decided to suspend Nunn, as he and Monastyrski had agreed, and he called Nunn to his office to notify Nunn of the suspension. The General Counsel nevertheless contends that the instant situation is controlled by *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977), and he further asserts (G.C. Br., p. 10) that "Since the Supreme Court's decision in *Weingarten*, the Board has consistently taken an expansive view of an employee's rights to representation during an interview with his employer," citing *Glomac Plastics, supra*, and *Climax Molybdenum Company, a Division of Amax, Inc.*, 227 NLRB 1189 (1977).

Asserting that the October 31 situation did not involve either an investigatory or a disciplinary interview, and claiming that Nunn suffered no detriment by not having representation where the only purpose for the meeting was notification of a predetermined discipline, and further claiming that to require employers to supply union representation on such occasions would place a needless and unjustifiable burden on them—Respondent urges that the Act did not mandate Nunn's entitlement to a union representation on the occasion of his October 31 suspension. Respondent cites various authorities, including a Board decision, to support its thesis. I shall not discuss them, however, because, like Administrative Law Judge Jalette,² I believe that the *Certified Grocers* case is controlling in this situation.

In *Certified Grocers*, the employer's executive director, Walz, decided to give employee Vaughan a disciplinary layoff. Walz prepared the appropriate disciplinary notice and sent it to his subordinate supervisor, Riddle, who in turn was to deliver it to Vaughan. Vaughan was thereupon called to Riddle's office and, apprehensive that Riddle might be disciplining him, he asked Riddle to have a union steward present. Riddle denied the request, saying a steward was not necessary. Riddle then told Vaughan that the employer had reviewed his performance records and found his work unsatisfactory and he [Riddle] was therefore issuing Vaughan a notice of disciplinary layoff. Vaughan asked to see his performance records and again requested a shop steward; Riddle denied both requests. Riddle then signed the notice which Walz had prepared and gave it to Vaughan. Vaughan inquired what the employer wanted of him, and Riddle said that he expected the job to be done.

² Administrative Law Judge Jalette recently discussed this matter at some length in *United States Postal Service*, Case 6 CA 9998(P), JD 197 78 (April 5, 1978).

The purpose of the Riddle-Vaughan meeting was to deliver the layoff notice, and the Board also found that Riddle had no authority to modify the notice or to withhold issuing it.

Despite the employer's contention that Riddle was performing only a ministerial function at his meeting with Vaughan and that it involved no investigative aspects of any sort, a majority of a Board panel concluded that Vaughan's Section 7 rights were violated by Riddle's refusal to accord him union representation. Board Member Walther dissented.

The General Counsel relies on the majority opinion in *Certified Grocers*, while Respondent urges that dissenting Member Walther "correctly summarizes and states that law applicable to the facts of the instant matter" (Resp. Br., p. 12). Although I might decide otherwise as an original proposition, I am bound by the majority decision and I accordingly conclude that Respondent unlawfully denied Nunn's request for union representation at the October 31 suspension meeting.

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. By denying Nunn's request for union representation at the October 31, 1977, meeting which was held solely to notify him of a predetermined suspension, Respondent has violated Section 8(a)(1) of the Act.
4. The foregoing unfair labor practice affects commerce within Section 2(6) and (7) of the Act.
5. Respondent has not violated the Act in any other respects alleged.

THE REMEDY

Having found that Respondent has engaged in a certain unfair labor practice, I shall recommend that it cease and desist therefrom and post an appropriate notice.

The Board in the *Certified Grocers* case also directed, among other things, that the employer expunge from its records all references to Vaughan's disciplinary layoff, rescind the layoff, and make Vaughan whole for any loss of pay resulting from the layoff (227 NLRB at 1215). I do not know the record in that case and therefore do not know all the facts and circumstances underlying the Board's Order. However, for remedial purposes in the circumstances of the present case, I believe such expunging and make-whole order would be unwarranted. Nunn, in my opinion, suffered no financial loss by reason of the absence of a union representative when he was notified of his suspension, and I am also convinced that the presence of such representative would not have affected that notification or Nunn's employment status.

[Recommended Order omitted from publication.]