

Armco Steel Corporation and Robert G. Patterson.
Case 6-CA-8588

September 29, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND MURPHY

On December 28, 1976, Administrative Law Judge Irwin H. Socoloff issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a brief in response to Respondent's exceptions and in support of his cross-exceptions;¹ Respondent filed a brief in answer to the General Counsel's cross-exceptions; the General Counsel filed a "Motion to Strike Respondent's Reply Brief";² and Respondent filed an "Opposition to Counsel for the General Counsel's Motion to Strike and/or Motion for Leave to File³ and/or Motion to Strike Portions of Counsel for General Counsel's Brief in Response to Exceptions."⁴

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, and conclusions⁵ of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

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, as modified below, and hereby orders that the Respondent, Armco Steel Corporation, Butler, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

¹ The General Counsel has excepted to the Administrative Law Judge's failure to order Respondent to rescind the warning letter given to employee Patterson and to expunge it from his personnel records. We find merit in this exception and accordingly shall provide for such action in our Order and notice.

² The General Counsel's motion to strike Respondent's reply brief is hereby denied as lacking in merit.

³ Respondent's motion for leave to file its answering brief is hereby granted.

⁴ Respondent's motion to strike portions of counsel for General Counsel's brief in response to exceptions is hereby denied as lacking in merit.

⁵ We agree with the Administrative Law Judge, for the reasons set forth fully by him, that Respondent violated Sec. 8(a)(1) by threatening to discharge employee Patterson for soliciting on company property to secure

1. Insert as paragraph 2(a) the following and reletter subsequent paragraphs accordingly:

"(a) Rescind the warning letter given to employee Robert G. Patterson on April 18, 1975, and expunge from his personnel file any reference thereto."

2. Insert footnote reference 13 at the end of paragraph 1(c), insert the following as footnote 13, and renumber the following footnote accordingly:

"¹³ Nothing herein, however, shall be construed as precluding Respondent from adopting a valid no-solicitation rule."

3. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER JENKINS, concurring:

I agree with my colleagues that Respondent violated Section 8(a)(1) of the Act by admonishing Charging Party Robert G. Patterson to cease his solicitation activities on company property or face disciplinary action. However, I reject as erroneous and contrary to the teachings of the Supreme Court as explicated in *Emporium Capwell Co. v. Western Addition Community Organization, et al.*, 420 U.S. 50 (1975), the rationale employed by the Administrative Law Judge and adopted by my colleagues for reaching this result.

In brief, the record shows that Respondent and the recognized bargaining agent at Respondent's Butler plant (Butler Armco Independent Union) agreed to a systemic reform of the existing seniority rules and practices at that location. The impetus for this reform was provided by a Title VII suit involving Respondent and other employers and the Steelworkers Union, which represented Respondent's employees at several locations other than the Butler works. This litigation resulted in a consent decree requiring Respondent and the Steelworkers to institute employee seniority systems based solely upon plant continuous service. The changes in seniority instituted at the Butler plant by agreement of Respondent and the Butler Armco Independent Union closely tracked the seniority reforms promulgated in the consent decree and were expressly designed:

signatures on a petition because of dissatisfaction with the contractual seniority system. Contrary to our concurring colleague, we think this case is clearly distinguishable from *Emporium Capwell Co. v. Western Addition Community Organization, et al.*, 420 U.S. 50 (1975), in that the Charging Party here circulated a petition, addressed to both the Employer and the incumbent Union, to renegotiate the seniority agreement. Specifically, the petition stated, *inter alia*, "We feel since the Company and Independent Union entered into this Agreement on a voluntary basis, it was a completely negotiable agreement, and was not negotiated to the best interests of all employees concerned. . . . We therefore Petition both parties to renegotiate the entire Program . . ." Thus, unlike *Emporium*, where the minority employees sought to bargain directly with the employer, bypassing the union, here the Charging Party sought to require both the Employer and the Union to renegotiate the agreement.

to provide equal employment opportunities without distinction based on race, color, sex or national origin to all employees at the Butler works

Shortly after the implementation of seniority reforms at Butler the Charging Party commenced his solicitation of signatures on two petition forms. One of these petitions was directed "against the hourly members of the Seniority Program Committee" and called for the replacement of such members because of their alleged failure to represent fairly all Butler employees. The second petition, on the other hand, was directed squarely against the agreement to, and implementation of, the reforms in seniority. This petition called upon both Respondent and the Independent Union "to renegotiate the entire [seniority] Program, and to use department and unit seniority" On April 16, 1975, and again on April 18, 1975, Respondent directed Charging Party Patterson to cease his solicitation on company property on pain of discipline or discharge.

In finding Respondent's conduct unlawful because it interfered with Patterson's Section 7 rights, the Administrative Law Judge apparently proceeded on the premise that Patterson's effort to force Respondent and the Union to renegotiate their agreement on seniority constituted protected activity under the Act unless Patterson's effort could be viewed as "aimed at causing an illegal result." Having concluded, however, that the agreement reached by Respondent and the Independent Union was not "the only possible resolution of the seniority issue which will satisfy the mandates of Title VII," the Administrative Law Judge had little difficulty either in finding Patterson's activity "protected" or in finding Respondent's interference with such activity unlawful.

The error in the Administrative Law Judge's analysis, an analysis which my colleagues adopt by implication, is that it flies in the face of the Supreme Court's *Emporium* holding. In that case the Court stressed its adherence to the principle of exclusive majority representation and concluded that concerted activity by employees, even in protest over alleged racial discrimination in the conditions of their employment, was without the protection of the Act when such activity was inconsistent with the position taken by the employees' recognized bargaining agent. In so doing, the Court pointed out: "Competing claims on the employer's ability to accommodate each group's demands . . . could only set one group against the other even if it is not the employer's intention to divide and overcome them." 420 U.S. at 67. And, moreover, the Court noted that the

recognized bargaining representative "has a legitimate interest in presenting a united front . . . and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interest." 420 U.S. at 70.

Although I dissented from the majority decision issued by my colleagues in the initial Board proceeding in *The Emporium* case,⁶ and although I continue in the opinion that Mr. Justice Jackson's observation on the role of the Supreme Court is perhaps apposite to the Court's subsequent adoption of the majority's position,⁷ I cannot comprehend how my colleagues can avoid the application of the Court's *Emporium* holding to the instant case.

Stripped to its bare bones, the record in this case reveals that one of the two petitions circulated by the Charging Party was addressed to the Employer and sought to pressure the Employer to abrogate and renegotiate the existing seniority agreement previously entered into between itself and its employees' recognized bargaining agent, and to do so in conformity with the specific demands and guidelines set forth in the petition circulated by the Charging Party. Through this petition the Charging Party, and the dissident minority of employees who supported his views, sought to usurp the function and authority of their recognized bargaining agent and to force the Employer to placate them by renegotiating the existing bargaining agreement in accordance with their demands. Thus is this case brought squarely within the *Emporium* holding and, were there nothing else in the record on which to predicate a finding of a violation, I would be constrained to dismiss the complaint. In justifying their refusal to follow *Emporium* here, my colleagues ignore the fact that the Charging Party's activities went far beyond a plea to renegotiate the existing agreement, and spelled out with great specificity just what the proposed revision should provide in order to restore the racial discrimination which the existing agreement remedied. Except for the fact that the protesters in *Emporium* desired to eliminate racial discrimination rather than restore it, the actions of the protesters both here and there are indistinguishable.

There is, however, one aspect of this case the proper consideration of which compels a finding that Respondent's conduct violated Section 8(a)(1) as alleged. As indicated previously, the Charging Party's activities included the circulation of two petitions, one of which averred that the Union had breached its duty of fair representation and sought employee support for the recall of employee repre-

⁶ 192 NLRB 173 (1971).

⁷ "We are not final because we are infallible but we are infallible only because we are final."

sentatives on the committee which had negotiated the new seniority agreement with the Employer.

Respondent's April 16 and 18 warnings to the Charging Party made no attempt to distinguish between his solicitation on behalf of the petition directed exclusively to the fair representation issue and the petition demanding renegotiation of the seniority agreement. Rather, Respondent's statements amounted to a flat prohibition of *all* solicitation activities carried on by the Charging Party. Inasmuch as solicitation in connection with the former petition is clearly "protected" activity within the meaning of the Act,⁸ and inasmuch as Respondent has failed to show some special circumstances to justify its infringement of its employees' undoubted right to solicit on company property on nonwork time, a violation of the Act is established.

⁸ See, in this regard, *N.L.R.B. v. Magnavox Company of Tennessee*, 415 U.S. 322, 325 (1974), wherein the Court stated:

The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute § 7 rights.

APPENDIX

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

WE WILL NOT instruct our employees to refrain from engaging in solicitation activities on company property.

WE WILL NOT threaten to discharge or otherwise discipline our employees should they engage in solicitation activities on company property.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act. Nothing herein, however, shall be construed as precluding us from adopting a valid no-solicitation rule.

WE WILL rescind the warning letter given to employee Robert G. Patterson on April 18, 1975, and expunge from his personnel file any reference thereto.

ARMCO STEEL
CORPORATION

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon charges filed on September 5 and October 22, 1975, by Robert G. Patterson, an individual, against Armco Steel Corporation, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint dated May 26, 1976, alleging violations by the Respondent of Sections 8(a)(1) and 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondent, by its answer, denied the commission of any unfair labor practices. Pursuant to notice, hearing was held before me in Pittsburgh, Pennsylvania, on August 5, 1976. The General Counsel and Respondent were represented by counsel and all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in this case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation engaged in the manufacture and sale of steel and steel products at its Butler, Pennsylvania, facility. During the year preceding issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, received goods and materials valued in excess of \$50,000 at its Butler, Pennsylvania, plant, which were shipped from points located outside the Commonwealth of Pennsylvania. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. Background

On April 12, 1974, the Attorney General of the United States filed an employment discrimination suit against nine major domestic steel companies and the United Steelworkers of America, AFL-CIO-CLC, herein referred to as the Steelworkers. That action,¹ before the United States District Court for the Northern District of Alabama, alleged broad patterns and practices of hiring and job assignment discrimination on the basis of race, sex, and national origin, in violation of Title VII of the Civil Rights Act of 1964, as amended,² and Executive Order 11246, as amended.³ Thereafter, in settlement of the suit, the parties agreed to the entry of a decree, subsequently upheld by a United States Court of Appeals,⁴ which, *inter alia*, included provisions requiring the companies, and the Steelworkers,

¹ *U.S. v. Allegheny-Ludlum Industries, Inc., et al.*, Civil Action No. 74-P-339.

² 42 U.S.C. 2000(e), *et seq.*

³ 3 CFR 169, *et seq.*

⁴ *U.S. v. Allegheny-Ludlum Industries, Inc., et al.*, 517 F.2d 826 (C.A. 5, 1975).

to institute employee seniority systems based solely upon "plant continuous service." Armco Steel Corporation, Respondent herein, was a party to that suit and is bound by the terms of the decree at those of its locations at which its employees are represented by the Steelworkers.

Following entry of the consent decree, on November 21, 1974, the Butler Armco Independent Union, which represents Respondent's employees at its Butler plant, entered into an agreement with Respondent establishing a seniority system in conformity with the provisions of the decree. Thereafter, in April 1975, employee Robert G. Patterson, aggrieved by the institution of the new seniority system, engaged in solicitation activities at the Butler plant in an effort to cause a renegotiation of the seniority agreement. Respondent's alleged interference with, and restraint of, Patterson's activities gave rise to the complaint in the instant case.

B. Facts⁵

On or about April 2, 1975, Patterson and his departmental union representative, employee Ronald Dellen, met with B. C. Huselton, Respondent's director of labor relations and an acknowledged supervisor within the meaning of the Act. Patterson expressed his dissatisfaction with the new seniority program and announced his intention to petition against it. He asked Huselton if the latter would do anything to change that program were Patterson able to obtain the signatures of a majority of the unit employees on his petition. Huselton stated that he could not guarantee anything, although he would certainly have to look at the signatures.

On April 7, 1975, Patterson began soliciting, inside the plant, seeking signatures on two petition forms. The first petition accused Respondent of failing to bargain in good faith with respect to the seniority matter; charged that the seniority agreement was not in the best interests of all affected employees; and urged:

We therefore Petition both Parties to renegotiate the entire Program, and to use department and unit seniority pertaining to a line of progression and regression.

The second petition accused certain union representatives of a failure fairly to represent all employees with respect to seniority issues. By April 16, Patterson had obtained more than 100 signatures.

Huselton placed a telephone call to Patterson on April 16, told Patterson that he was causing a problem, and further stated that, unless Patterson ceased his solicitation activities on company property, he would be fired. On the next day, Patterson resumed his activities, outside the plant near the main gate, where he remained for some 3 hours until again admonished by Huselton to cease soliciting on company property.⁶ On April 18, Patterson received a letter from Huselton, which stated:

⁵ The fact findings contained herein are based on the testimony of Patterson, Union Representative Ronald Dellen, and Respondent's supervisor, B. C. Huselton.

⁶ At or about this time, Huselton contacted Dellen and told him to inform Patterson that, unless Patterson ceased soliciting petition signatures on company property, he would receive a warning letter.

At 5:00 P.M., April 16, 1975, you were notified by telephone that you had violated specific Company regulations of the following nature.

- A. Soliciting on Company property.
- B. Driving in the Plant without a Drive-In Pass.
- C. Being in the Plant at unauthorized times under other than work-related conditions.

You acknowledged that you understood and that you were now aware of these regulations.

At 8:15 A.M., April 17, 1975, you were notified in person that you were not authorized to solicit outside the Main Gate and that you were on Company property. You acknowledged that you understood.

Subject letter is to inform you that any further violation of the cited regulations will result in more severe disciplinary action.

Following the confrontation with Huselton at the main gate, Patterson continued his solicitation drive, off company property, at a point contiguous to the employee parking lots. Patterson also solicited at a nearby bar and, by June 16, 1975, he had obtained more than 550 signatures from an employee complement numbering 3,800. During this campaign, he published a letter in a local newspaper which, *inter alia*, contained a description of the oral and written warnings he had received from Huselton. In addition, as part of his solicitation drive, Patterson freely disseminated, among the unit employees, information concerning the Huselton warnings.

Respondent's interference with Patterson's activities was a departure from its own past practices. This Employer has no prior history of unfair labor practice conduct and, moreover, it had not, heretofore, attempted to restrain any of a host of solicitations which have occurred at the Butler plant. Such past solicitation efforts have included periodic petitions by employees who sought the requisite 200 signatures in order to run for union office.

Huselton testified that his warnings to Patterson were not intended to restrict employee solicitations, other than the one in which Patterson was engaging. Rather, according to Huselton, the Patterson matter presented a unique situation. Patterson's activities occurred during a period of great unrest among the Butler employees, following implementation of the seniority agreement. The issue was highly inflammatory and gave rise to the filing of some 150 grievances, including several filed by Patterson. In addition, Huselton testified, he received complaints from employees with respect to the aggressive nature of Patterson's solicitations and the fact that he solicited employees on their worktime.⁷ The plant guards informed Huselton that Patterson continually drove through the internal plant road without authorization.

⁷ Patterson, in his testimony, conceded that he approached employees during their worktime, but claimed that those employees were not actually engaged in work when he sought their signatures. He also acknowledged that his activities resulted in threats to his personal safety, made by fellow employees.

C. Conclusions

The General Counsel contends that the instant case is governed by the numerous Board and court decisions upholding the right of employees to engage in nonwork time solicitations on their employer's property. Thus, in *Stoddard-Quirk Manufacturing Co.*,⁸ the Board held at 621:

To sum up, we believe that to effectuate organizational rights through the medium of oral solicitation, the right of employees to solicit on plant premises must be afforded subject only to the restriction that it be on nonworking time.⁹

Thus, the General Counsel asserts that Respondent, by its oral and written threats to discharge or otherwise discipline Patterson if the latter persisted in his solicitation drive on company property, restrained the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act. Indeed, the General Counsel is of the view that the foregoing conduct should not be construed as limited in application to the Patterson matter but, rather, constituted an effective promulgation of a general, unlawfully broad, no-solicitation rule.

Respondent contends that its actions in this matter were of limited scope, applying only to the Patterson solicitation drive, and may not be viewed as a promulgation of an unlawful rule in conflict with its own past practices. As to the specific interference with Patterson's efforts, Respondent asserts that:

(1) Patterson's activities were not protected by the Act since he was engaged in an effort to force the Respondent to abandon its obligations under Title VII of the Civil Rights Act.

(2) Assuming Patterson's activities were initially protected, the statutory protection was lost when Patterson pursued his objectives in an aggressive and disruptive manner.

(3) In any event, Respondent's actions, in the circumstances of this case, do not justify the issuance of a remedial order.

Respondent's first two defenses require little attention. Thus, unless it be assumed that the seniority agreement instituted by Respondent and the Union is the only possible resolution of the seniority issue which will satisfy the mandates of Title VII (a proposition certainly not established on this record), Patterson's efforts to cause a renegotiation of that agreement cannot be viewed as necessarily aimed at causing an illegal result. The short answer to the second defense is that, whatever legitimate concerns Respondent may have entertained with respect to the manner of Patterson's solicitations, the restrictions it imposed affected, not the *manner*, but the *place* of solicitation.

Respondent's final defense, while superficially appealing, must also fail as a matter of law. Although I agree with

Respondent that its actions herein cannot be viewed as tantamount to a promulgation of an unlawful rule of general application, I cannot agree that Respondent's interference with Patterson's activities was of a sort tending to have only minimal impact upon the exercise of Section 7 rights by its employees. In reaching this conclusion, I am mindful of, and sympathetic to, the fact that Respondent has not, heretofore, sought to interfere in the organizational and other Section 7 rights of its employees. Moreover, as urged by Respondent, its interference with Patterson's solicitations occurred in unique circumstances, and against a background of tense employee emotions created by Respondent's voluntary efforts to comply with the mandates of Title VII of the Civil Rights Act. The difficulty with Respondent's position is that its obligations under Title VII, and its obligations under this Act, are not mutually exclusive. Indeed, the fact that Patterson's activities served to increase the tensions created by Respondent's attempted compliance with Title VII requirements only underscores the importance of protecting such activity. Otherwise, the Act's protection would run only to concerted activity having least effect upon employee interests.

The impact of Respondent's restraint of Patterson's solicitation efforts was not limited to the single employee. Some 550 of Patterson's fellow employees, by their signatures on the petition forms, joined him in concerted activity. Moreover, Respondent's threats, and other interference, received wide circulation among the unit employees.¹⁰ Whatever Respondent's past liberal attitude toward employee solicitations, its actions herein conveyed the message to its employees that solicitations on company property will be permitted only when Respondent does not object to the content of the solicitations.

The cases cited by Respondent, in support of its position that its actions do not require or justify the issuance of a remedial order, are cases in which the impact of the unlawful conduct was clearly limited to a small number of employees and or, the respondent itself proceeded to remedy the effects of the unlawful conduct.¹¹ Those circumstances do not obtain here. Accordingly, I find that Respondent, by its oral and written instructions to Patterson, to cease soliciting on company property, on penalty of discharge or other discipline, has violated Section 8(a)(1) of the Act.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening commerce and the free flow of commerce.

¹¹ See, e.g., *American Federation of Musicians, Local 76, AFL-CIO (Jimmy Wakely Show)*, 200 NLRB 620 (1973).

⁸ 138 NLRB 615 (1962).

⁹ The Board has also applied this principle to concerted nonunion activity. See, e.g., *Samsonite Corporation*, 206 NLRB 343 (1973).

¹⁰ The fact that Patterson was responsible for this circulation does not dilute its effects upon other bargaining unit employees.

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Armco Steel Corporation is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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

ORDER¹²

The Respondent, Armco Steel Corporation, Butler, Pennsylvania, its officers, agents, successors, and assigns, shall:

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.

1. Cease and desist from:

(a) Instructing employees not to engage in solicitation activities on company property.

(b) Threatening employees with discharge or other discipline should they engage in solicitation activities on company property.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act to engage in concerted activities for their mutual aid and protection or to refrain from such activity.

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

(a) Post at its Butler, Pennsylvania, facility, copies of the attached notice marked "Appendix."¹³ Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent 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.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹³ In the event that the Board's 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."