

**Sioux Quality Packers, Division of Armour and Company and Philip C. Mossberg and Eugene Means and Eugene E. Means.** Cases 18-CA-4380 and 18-CA-4783

October 13, 1977

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND MURPHY

On May 2, 1977, Administrative Law Judge James M. Fitzpatrick issued the attached Supplemental Decision in this proceeding.<sup>1</sup> Thereafter, Respondent and the Charging Party filed exceptions and supporting briefs, and Respondent filed a brief in answer to the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith, to modify the remedy so that interest is to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977),<sup>2</sup> and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found, and we agree, that Eugene Means was discriminatorily suspended and discharged, in violation of Section 8(a)(3) of the Act, on October 8 and 10, 1974, respectively. Through intervention of the union representing Means' bargaining unit, Means was reinstated to his position on December 30, 1974, although without backpay. The Administrative Law Judge therefore properly ordered that Means be awarded backpay to the time of his reinstatement.

Means was discharged again, however, on May 7, 1975, after having been suspended on May 6, 1975, for alleged insubordination. The Administrative Law Judge found the discharge lawful stating, "His resulting suspension and discharge for insubordination was not an unlawful discrimination." Thus, the Administrative Law Judge treated the suspension and subsequent discharge as a response *solely* to the alleged insubordination. The record, however, does not support this finding.

Whatever the merits of the suspension for insubordination may be,<sup>3</sup> it is clear that the conversion of the suspension to a discharge the following day was caused by more than the insubordination. Respondent informed Means that the decision to convert the suspension to a discharge was based not only upon

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his actions of May 6, but also upon his "poor overall work record." Respondent admits that Means' overall work record includes his previous discharge. As we have found the first discharge to be unlawful, the second discharge, based in part upon the first unlawful discharge is, *a fortiori*, also unlawful. We so find. Accordingly, we shall order that Means be offered reinstatement and made whole for the losses which he has sustained as a result of his unlawful discharge on May 7, 1975, as well as the losses generated by his suspension and discharge of October 8 and 10, 1974, respectively.

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, Sioux Quality Packers, Division of Armour and Company, Sioux City, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer to Eugene E. Means immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, and make him whole for any loss of earnings he may have sustained as a result of Respondent's discrimination against him in the manner set forth in the remedy, as amended."

2. Substitute the following for paragraph 2(b):

"(b) Revoke and expunge from its records all personnel actions and memoranda relating to the suspension and discharge of Eugene Means in October 1974 and his discharge in May 1975 and notify Means in writing when such actions and memoranda have been revoked and expunged from his records."

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

<sup>1</sup> The Board's original Decision and Order in this proceeding is found at 228 NLRB 1034 (1977).

<sup>2</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>3</sup> The suspension was not alleged in the complaint as an unfair labor practice, nor was its legality apart from the discharge litigated at the hearing.

APPENDIX

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

The Act gives all employees these rights:

- To act together for collective bargaining or mutual aid or protection
- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through representatives of their own choosing without interference, restraint, coercion, or discrimination from management
- To refrain from any or all of these things.

WE WILL NOT suspend, discharge, or in other ways discriminate against employees for engaging in union activities or concerted activities.

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

WE WILL offer Eugene Means reinstatement to his former job or, if that job no longer exists, to a substantially equivalent one.

WE WILL pay Eugene Means for any loss of earnings resulting from his suspension and discharge in October 1974 and his discharge in May 1975 with interest.

WE WILL revoke and expunge from our records all personnel actions and memoranda relating to the suspension and discharge of Eugene Means in October 1974 and his discharge in May 1975 and notify Means in writing when such actions and memoranda have been revoked and expunged from his records.

SIoux QUALITY PACKERS,  
DIVISION OF ARMOUR  
AND COMPANY

SUPPLEMENTAL DECISION

JAMES M. FITZPATRICK, Administrative Law Judge: On March 23, 1977, the Board remanded this case<sup>1</sup> with directions to prepare a supplemental decision. Based on the entire record, including my observation of the witnesses and consideration of the briefs filed by the General Counsel and the Respondent, I make the following additional:

FINDINGS OF FACT

A. *The Issues*

It is undisputed that on October 8, 1974, Respondent indefinitely suspended employee Eugene Means, and on October 11 discharged him, on the grounds he did not report for work on October 8. The General Counsel contends he did report and the Respondent took action against him because he was an aggressive union steward.

<sup>1</sup> 228 NLRB 1034.

<sup>2</sup> Local P 1142, Amalgamated Meat Cutters and Butcher Workmen of

On December 30, 1974, he was reinstated but without backpay.

On May 6, 1975, Means was again suspended, and on May 7 discharged, for leaving his work station to go to the toilet although his foreman had refused him permission to leave. The General Counsel claims the same reasons motivated this suspension and discharge.

As set out more fully below, I find that the October suspension and discharge were unlawfully motivated but that it is not established that the May suspension and discharge were unlawful. At the end of the hearing I reserved ruling on Respondent's motion to dismiss. I now deny that motion as to the allegations dealing with the October suspension and discharge and grant the motion as to those dealing with the May incident.

B. *Means' Employment Record*

Means began his employment with Respondent on October 9, 1969. Since 1973 he has been classified as an aitchbone breaker in the kill department but also performs other jobs when so assigned by the foreman.

The kill department slaughters hogs. The central feature of the operation is a continuously moving chain carrying hog carcasses from the stick pen at the beginning of the line to the cooler at the end, at speeds of either 600 or 480 hogs per hour. A foreman and two assistants supervise about 81 employees working along this line. When the chain is started at the beginning of a shift about 14 minutes elapse before the first hog reaches the end of the line in the cooler. During this time the supervisors must assign workers to all the jobs along the line.

In the eyes of management Means was less than a model employee. Between his hiring in 1969 and his discharge in October 1974 he was twice warned in writing for excessive tardiness. He was also given three written warnings for leaving his work station without permission. With the second of these warnings he received a 2-week suspension, and with the third an indefinite suspension pending investigation. He was later reinstated. In May 1974 he received a written warning for failing to follow instructions.

C. *Management's Attitude Toward Means' Union Activity*

Means joined the Union<sup>2</sup> 2 weeks after he was hired in October 1969. During much of his tenure with Respondent he served as union steward. Thus, he was an ordinary steward in the kill department from February 1972 to February 1974, chief department steward from February 1974 to February 1975, and ordinary steward from February 1975 to May 7, 1975.

While he was chief department steward he filed, according to him, between 200 and 300 grievances. This, however, must be understood in context. At the time there were a total of 20 stewards in that department and Means may have included in his count grievances he handled with other stewards. In any case, a great many grievances were being filed. The plant employment manager, Robert Dather, testified credibly, and I find, that between July

North America, AFL-CIO, and Respondent were parties to a collective-bargaining agreement covering the unit to which Means belonged.

1974 and May 1975, 23,000 grievances were filed in the plant and of those Means filed only 107. The chief department steward who succeeded Means filed 123 grievances during the year preceding the hearing. I find that although Means was active in filing grievances, the number he filed was not outstanding compared with others and by no means could he be classed as a great grievance giver.

Nevertheless, management considered him a troublemaker, an attitude based in substantial part on his representation of employees in grievances. Thus, in 1973 Arlo Fay, one of the kill department foremen, decided not to assign employee Ronnie Guy to work next to Means and Michael Klein (both of whom were union stewards) because, "That is a bad place for you. They are bad ones for you guys to get associated with."

In September 1974, the month preceding his October 1974 discharge, Means was twice described by management officials as a troublemaker in connection with his representation of employees. Thus, at a grievance hearing involving Lyle Parker who was being represented by Means as chief departmental steward, then Plant Manager Gene West told Means he was nothing but a damn troublemaker because he was always going to bat for grievants. On another occasion, when Means advised employee Thomas Peters, who had cut his finger on the job, that he was entitled to go home if he wished rather than be reassigned by foreman Arlo Fay to another job, Fay questioned Peters as to whether Means had put him up to stating that he wanted to go home and described Means and his group as troublemakers.

#### D. *The October 1974 Discharge*

##### 1. The evidence

For several days prior to October 8, 1974, Means was off work due to illness. On the morning of October 8 he reported to the plant at the normal starting time. Not finding his timecard at the timeclock, he went to the personnel office to obtain it.<sup>3</sup> He then punched in and about 7:02 a.m. appeared at the top of the stairs going on to the floor of the kill department where he joined two other workers, Ronnie Guy and Thomas Peters, who were awaiting assignments. According to Guy, whom I credit, they were all equally prepared for work in that they wore hard hats and had with them steels for sharpening knives.<sup>4</sup>

Means had job rights (i.e., he was entitled to perform) to the work of breaking aitchbones when that job was being performed, as it was on October 8, and irrespective of the chain speed.<sup>5</sup> While he was off sick, someone else had performed that job and on the morning in question was already at that work station, about 5 feet from the top of the stairs, when Means arrived. He could have "bumped" that worker off the job, subject to the right of management to assign him to another spot. But on October 8, Means for some reason did not go up on the bench to stand beside the

man on "his" job, as he had on prior occasions. He remained a few feet away at the head of the stairs with Guy and Peters.

Huls, his foreman, saw him there with the other two shortly after 7 o'clock. During the next few minutes Huls assigned work to both Guy and Peters, neither of whom had the job rights of Means, but he said nothing to Means nor did Means speak to him. Means was waiting to be told where to work. Huls was waiting for him to claim the aitchbone breaking job or to ask for an assignment. Huls testified he was unsure whether Means was available for work or not since he had been off sick and it was not unknown for employees on sick leave to be at the plant for some reason. In this I find Huls was less than candid. Means was at the place where work was being assigned, at the time when assignments were being made, in the company of other employees to whom Huls was giving assignments, and only about 5 feet from the place of his usual assignment. The reasonable inference from these circumstances is that he was reporting for work. But Huls felt no compulsion to speak to him since he did not consider that part of his job. Circumstances remained substantially unchanged for almost half an hour during much of which Means was at the stairs. Huls testified that Means came and went several times. But even if such were the case, established practice allowed those awaiting assignment to briefly leave the vicinity of the top of the stairs.

Huls and Means each felt the other ought to take some further step. But neither did. On this conflict I find the greater onus falls on the supervisor who had the more fundamental responsibility of staffing the entire line. Where, as here, the rank-and-file employee has effectively reported for work by being in approximately the right place at the right time, and any doubt in the mind of the supervisor could have been easily dispelled by the exchange of a few words, it was nit-picking for Huls to assume he was not reporting for work because he neither mounted the bench to stand behind the man assigned to aitchbone breaking nor verbally requested an assignment. In the circumstances his presence was a request.

Huls' specious rationale raises doubt as to his motive in not giving Means an assignment. He himself doubted the soundness of his position. About 7:35 he went to Robert Dather in personnel to ask if Means was supposed to be working. Dather informed him he was. Huls indicated he could not find him. Dather then looked for and found him in the lunchroom 5 minutes later.

Still, neither assigned him any work, or even spoke to him. Instead they decided to play a game, to watch him to see how long it would take him to verbally contact a supervisor, to see what he was up to. During the next hour Dather kept Means under surveillance while making notes. At 7:45 Means went back to the stairway at the kill department. Ten minutes later he returned to the lunchroom. Nine minutes later he was back at the bottom of the stairs, then he went to the locker room. At 8:10 he was

credit him in this. It was common practice for a worker to obtain appropriate knives from his locker after receiving a work assignment.

<sup>5</sup> Means took the position that he "owned" that job only at a chain speed of 600 hogs per hour. In this he was mistaken. He was entitled to the job if it was being performed as a separate job, irrespective of chain speed.

<sup>3</sup> It is not clear why at this particular time his timecard was in the personnel office rather than at the timeclock where he expected it to be.

<sup>4</sup> Their supervisor, Eugene Huls, who was assigning work, attempted to buttress his testimony that he was unsure whether Means was there for work by giving the impression that Means was unprepared for work. I do not

back on the stairs where he spoke with a number of employees coming and going. At 8:19 he again went to the locker room, returning to the stairs at 8:32. At 8:40 he went down to the hallway, then a minute later back to the top of the stairs. At 8:45 Huls suspended him. During that hour Huls passed him a number of times while going up or down the stairs, but neither spoke to the other.

Means suspected all was not well because 5 or 10 minutes before his suspension he asked another employee what was going on.

The weight of the evidence indicates that on occasion employees awaiting assignment wait for substantial periods before being assigned a job and during their wait do not necessarily remain at the top of the stairs.

Immediately after his suspension Means, in accordance with established procedures, requested an emergency meeting between management and union stewards on his suspension. The emergency meeting was held at 9 a.m. Assistant Plant Manager Harvey Misenor informed Means he was suspended indefinitely pending a complete investigation.

It was understood that the meeting would reconvene when the investigation was completed. However, no further meeting was called on October 8 or 9. By the time of the morning break on October 10, kill department employees were sufficiently upset so that they engaged in a brief work stoppage by not returning to work after the break. Management then immediately met with the union committee even though they had not reached a decision on Means. The credited testimony of both Means and Michael Klein indicates, however, that management blamed Means for the work stoppage. In fact he had recommended against it.

Local management decided Means should be fired. After obtaining concurrence from corporate management in Phoenix, Misenor reconvened the meeting with the union committee in mid-afternoon on October 10. He announced the discharge of Means.

Due to similar instances of behavior in the last two years, and this individual's overall work record, we feel the decision that must be taken is complete discharge.

Means remained discharged until December 30, 1974, at which time through the efforts of the Union he was reinstated without backpay.

## 2. Concluding findings regarding the October 1974 discharge

I find that Huls and Dather never had grounds to discharge Means. They had only minor reason to criticize him which they used as a premise for indulging in game playing, a game which would never have started if either Huls or Means had spoken to the other. In these circumstances earlier comments indicating a management opinion that Means was a troublemaker in representing employees take on added significance. They supply a reason why Huls and Dather would participate in their

<sup>6</sup> The following account of the events on May 6 is based on the credited testimony of Klein. In major respects he is corroborated by Means and Huls. Insofar as their accounts vary from his, I credit Klein as the more

childish charade—the aim being to maneuver Means out of his employment at the plant. His suspension and termination in such circumstances would inevitably discourage employee support for the Union. I find, therefore, that his suspension on October 8 and his discharge on October 11 were unfair labor practices prohibited by Section 8(a)(3) and (1) of the Act.

## E. The Discharge in May 1975

### 1. The evidence

As already noted, Means was reinstated to his job on December 30, 1974. On the morning of May 6, 1975, he and Michael Klein were assigned to work on the same bench opening hogs.

Respondent maintains a plant rule requiring employees to remain at their work stations unless they have permission from a supervisor to leave. The collective-bargaining agreement provides exceptions to the rule in the form of a lunchtime break, a mid-morning break, and a mid-afternoon break. Other breaks for which permission is obtained are accommodated by a spell out or relief man employed for that purpose. He, of course, cannot be in more than one place at a time and employees wishing to be relieved frequently must wait until he is available. In emergencies a foreman takes over an employee's duties until the spell out man arrives.

Means and Klein, who frequently worked together, had on occasion spelled out each other when they wanted extra breaks. One would take a break while the other performed both jobs. But in the morning of May 6 they had been ordered by Huls to discontinue this practice. In any case, according to Klein,<sup>6</sup> Means had a sore hand that day which would prevent his performing both jobs.

According to Klein, both he and Means needed to use the toilet at the same time that morning and they caused the horn to be blown so they could be relieved. When Huls arrived at their station in answer to the horn, Klein told him of his need and asked for an emergency break. Means also told Huls of his need. Huls just waved his hand and left. Four or five minutes later he returned to tell them he (presumably Huls himself) would not spell them out because they had been leaving every day and were abusing the matter. He told Means, in effect, that he could defecate in his pants.

When Huls refused to spell out Klein on an emergency basis, Klein requested the presence of the chief plant steward, Ed Jeffers. When he arrived 5 minutes later accompanied by Huls and Chief Departmental Steward Javier Fuentes, Means intervened, claiming that both he and Klein had to go at once. Jeffers instructed Huls he should let them out if it was an emergency. But Huls refused, declaring that Klein and Means abused the matter.

Means then walked off the job saying he had to take an emergency break. Huls took over his job. Five minutes later the spell out man arrived and relieved Klein.

disinterested witness and because in demeanor he appeared the most forthright and believable witness.

After relieving himself Means returned to his work. About a half hour later Huls suspended him indefinitely for walking off the job without permission.

The next day, May 7, the union committee and management, with Means present, discussed the suspension. During the discussion, Jeffers admitted that Means was in the wrong. Later that day management changed the suspension to discharge because of what happened May 6 and also because of Means' poor overall record.

## 2. Concluding findings regarding the May discharge

The circumstances of the May 6 incident make clear that Huls did not believe a true emergency existed even though Klein and Means declared it did and, accordingly, refused them permission to leave until relieved by the spell out man. This was an honest, nondiscriminatory business judgment even if in fact Huls was in error (which I do not find). Means was insubordinate in affronting that decision. His resulting suspension and discharge for insubordination was not an unlawful discrimination.

The General Counsel argues that this was more of the same discrimination which occurred in October. But that does not follow. Five months had elapsed between the incidents. In May there was clear cause for discharge. And even an employer with animus toward a union activist is not by that circumstance deprived of the power to discharge for cause. See *Whitcraft Houseboat Division, North American Rockwell Corporation*, 195 NLRB 1046, 1048 (1972).

In sum, I find there is insufficient evidence to sustain the allegations of the complaint regarding the May discharge.

## F. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of Respondent set forth above, which are found to be unfair labor practices, occurring in connection with its operations described in the initial decision herein, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## CONCLUSIONS OF LAW

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

2. By suspending Eugene Means on October 8, 1974, discharging him on October 10, 1974, and thereafter not reinstating him until December 30, 1974, Respondent discriminated against him, thereby discouraging membership in a labor organization, and thereby engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

<sup>7</sup> 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.

3. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondent engaged in unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. I recommend that Respondent be ordered to make Eugene Means whole for any loss of earnings suffered by reason of the unfair labor practices committed against him by Respondent between October 8, 1974, and December 30, 1974, as found above, by paying him a sum of money equal to that which he would have earned, less his net earnings, during such period. Backpay is to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon at 6 percent calculated according to the formula set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I further recommend that Respondent be required to preserve and make available to Board agents, upon request, all pertinent records and data necessary in analyzing and determining whatever backpay may be due. I also recommend that Respondent be required to expunge from its records all memoranda and personnel actions relating to said discrimination. See *Crown Central Petroleum Corporation*, 177 NLRB 322, 323 (1969). I also recommend that Respondent post appropriate notices at its plant in Sioux City, Iowa.

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

## ORDER<sup>7</sup>

Respondent, Sioux Quality Packers, Division of Armour and Company, Sioux City, Iowa, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending, discharging or otherwise discriminating against employees for engaging in union or protected concerted activity.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist a labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Make Eugene Means whole for any loss of earnings in the manner set forth in the section entitled "The Remedy."

(b) Revoke and expunge from its records all personnel actions and memoranda relating to the suspension and discharge of Eugene Means in October 1974 and notify

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.

Means in writing when such actions and memoranda have been revoked and expunged from his records.

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all personnel records and memoranda regarding Eugene Means and all other records necessary to analyze the amount of backpay due under the terms hereof.

(d) Post at its Sioux City, Iowa, plant copies of the attached notice marked "Appendix."<sup>8</sup> Copies of said notice, on forms provided by the Regional Director for

<sup>8</sup> In the event the Board's Order is enforced by a Judgment of the 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

Region 18, after being duly signed by Respondent's authorized representative, shall be posted 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 ensure that said notice is not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."