International Association of Machinists and Aerospace Workers, District No. 15, AFL–CIO *and* Carl Nocera and Burroughs Corporation, Party to the Contract. Case 22–CB–3385

August 24, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND WALTHER

Upon a charge filed on November 22, 1976, by Carl Nocera, an individual, herein called the Charging Party, and duly served on International Association of Machinists and Aerospace Workers, District No. 15, AFL–CIO, herein called Respondent, the General Counsel of the National Labor Relations Board by the Regional Director for Region 22, issued a complaint and notice of hearing on January 7, 1977, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

Respondent filed a Motion for Summary Judgment and memorandum in support thereof on February 18, 1977, requesting dismissal of the complaint. On February 25, 1977, the Regional Director issued an "Order Granting an Extension of Time for Filing Answer and Postponing Hearing." On February 28, 1977, Burroughs Corporation, herein called the Employer, filed a statement of position in response to Respondent's motion arguing that a hearing should be held on the numerous factual issues presented herein. Thereafter, on March 2, 1977, the Board issued an order transferring proceedings to the Board and a Notice To Show Cause. On March 17, 1977, counsel for the General Counsel filed a Cross-Motion for Summary Judgment and memorandum in support thereof.

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.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

A review of the entire record herein, including the pleadings, the motions, and the submissions of the parties, reveals that from March 17, 1975, the Employer and Respondent were parties to a collective-bargaining contract effective to March 18, 1977, which contained a valid union-security provision and provided for arbitration.[1] On July 10, 1975, Respondent requested that the Employer discharge certain employees, including the Charging Party, for failure to pay May and June 1975 dues pursuant to the union-security provision. The Employer refused Respondent's request, citing Respondent's failure to comply with the notice provision of the union-security clause. The Charging Party tendered his dues on July 21, 1975, but Respondent rejected it. Thereafter, on July 23, 1975, Respondent filed four grievances emanating from the Employer's refusal to comply with Respondent's discharge demand and again requesting the terminations. The dispute was submitted to arbitration in accord with the provisions of the collective-bargaining contract. On June 1, 1976, Respondent's authority to maintain a union-security clause was withdrawn in Case 22–UD–146. Thereafter, on June 3, 1976, the arbitrator issued an interim award of arbitrator which denied Respondent's grievances,[2] but did not determine the responsibilities of the individual employees, including the Charging Party, with respect to the payment of back dues. The Employer and Respondent settled the dues obligation by letter agreement dated August 27, 1976, in which they agreed that (1) certain employ-

[1] The pertinent parts of the union-security agreement are set forth here:

> 3.01 It shall be a condition of continued employment that all employees of the Company covered by this Agreement who are members of the Union in good standing . . . shall remain members in good standing . . . It shall also be a condition of continued employment that all employees covered by this Agreement and hired on or after its effective date, shall on or within ten (10) days after the thirtieth (30th) day following the beginning of such employment, become and remain members in good standing in the Union.
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> 3.02 For the purposes of this Article, to be a "member in good standing" is to tender to the Union the initiation and/or reinstatement fee uniformly required and the periodic dues uniformly required.
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> 3.03 No employee shall be terminated under this Article, however, unless:
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> (a) The union first has notified him by registered letter of his delinquency on not tendering the initiation and/or reinstatement fee and/or periodic dues uniformly required and warning him that unless such fee and/or dues are tendered within seven (7) days of his receipt of such notice that he will be reported to the Company for termination from employment; and
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> 3.04 Any dispute concerning whether an employee is a member in good standing shall be subject to the Grievance Procedure, including Arbitration.

[2] In his interim award, the arbitrator found that Respondent, in asking the Charging Party for payment of May and June 1975 dues, had not complied with the notice provisions set forth in sec. 3.03(a) of the union-security clause and that the Charging Party subsequently did make tender of his dues on July 21, 1975, upon learning that a notice had been mailed to him which he had not received. On July 25, 1975, Respondent rejected this tender and advised the Charging Party that his membership had been canceled and his termination had been requested. A subsequent tender of 4 months' dues on August 12 was also rejected and the Charging Party was again advised that his membership had been canceled.

ees, including the Charging Party, owed back dues for the period of May 1975 to May 1976, while the union-security provision was in effect, and that (2) said employees would be discharged if they failed to pay said dues within 60 days after notice of the exact amount of dues owed. Respondent notified the Charging Party by certified letter, dated November 17, 1976, of this settlement agreement and his obligations thereunder and advised that, if there was noncompliance, the Employer would be advised and the Charging Party would be terminated. On November 22, 1976, the Charging Party, who has not complied with the terms of the settlement agreement and who remains employed by the Employer, filed the instant charge.

The complaint issued herein alleges, in substance, that since August 27, 1976, Respondent has violated Section 8(b)(2) of the Act by causing or attempting to cause the Employer to discriminate against the Charging Party on grounds other than his failure to tender periodic dues and initiation fees uniformly required as a condition of employment under the union-security agreement, and that since November 17, 1976, Respondent has violated Section 8(b)(1)(A) of the Act by threatening the Charging Party with discharge from employment for failure to tender back dues (1) despite the absence of a valid union-security agreement and (2) notwithstanding that membership in Respondent had been denied or terminated on grounds other than his failure to tender the periodic dues uniformly required as a condition of employment during the period between May 1975 and May 1976.

Respondent's Motion for Summary Judgment requests dismissal of the complaint on the grounds that the arbitrator's interim award and letter agreement of August 27, 1976, between the Employer and Respondent resolved and settled the dispute involving the Charging Party and that Respondent's request that the Employer discharge the Charging Party for failure to pay dues was consistent with Board precedent.

In his Cross-Motion for Summary Judgment counsel for the General Counsel contends that Respondent violated the Act by conditioning the Charging Party's continued employment on the payment of union dues after its authority to do so had been revoked and after it rejected the Charging Party's tender of dues. We find no merit in Respondent's contention that the award and subsequent letter agreement resolved the issues herein[3] and we agree with the General Counsel's position.

It has long been established "that the proviso to Section 8(a)(3) sets up a provable defense to conduct outlawed by 8(b)(2) of the Act, only in the limited situation where a union can show the existence of a permissible union-security contract in effect *at the moment* the attempted or actual discharge action is taken." *Marlin Rockwell Corporation,* 114 NLRB 553, 556, fn. 6 (1955). See also *Haffenreffer & Co., Inc.,* 104 NLRB 206, fn. 2 (1953). Here Respondent had been deauthorized on June 1, 1976. The letter agreement of August 27, 1976, between the Employer and Respondent providing for the termination of employees, including the Charging Party, if they failed to pay the dues owing between May 1975 and May 1976, constitutes an attempt to cause the Employer to discharge the Charging Party for his failure to pay back dues at a time when no union-security provision was in effect and this violates Section 8(b)(2) of the Act. In addition, and *a fortiori,* Respondent's letter of November 17, 1976, also at a time when no valid union-security provision was in effect, threatening the Charging Party with discharge for failure to comply with the settlement between the Employer and Respondent, constitutes an independent violation of Section 8(b)(1)(A) of the Act.[4]

Accordingly, the Board hereby denies Respondent's Motion for Summary Judgment and grants the General Counsel's Cross-Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

The Employer is a Michigan corporation with its principal office and place of business at Burroughs Plaza, Detroit, Michigan, and various other plants in the State of New Jersey, including the plant involved herein at 300 South Randolphville Road, Piscataway, New Jersey, herein called the Piscataway plant. Burroughs is engaged at said plant in the manufacture, sale, and service of business machines, data processing equipment, and related electronic products. In the course and conduct of its business operations during the preceding 12 months, a representative period, Burroughs caused to be manufactured, sold, and distributed at said Piscataway plant products valued in excess of $50,000, of which

[3] The arbitration award did not deal with the specific allegations of the complaint herein, and, as we have relied on the uncontroverted facts determined by the arbitrator, we find that neither the arbitrator's award nor the settlement agreement resolved the issues raised by the complaint. Further, we find that there are no litigable issues warranting a hearing and we therefore deny the Employer's request.

[4] The cases cited by Respondent are either distinguishable on the facts and the law from the situation herein, or support the General Counsel's position. In view of our determination herein, we find it unnecessary to consider the General Counsel's alternative theory of liability.

products valued in excess of $50,000 were shipped from said Piscataway plant in interstate commerce directly to States of the United States other than the State of New Jersey.

Burroughs is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

International Association of Machinists and Aerospace Workers, District No. 15, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Violations of Section 8(b)(2)*

Commencing on or about August 27, 1976, and at all times thereafter, Respondent encouraged membership in it by attempting to cause, and continuing to attempt to cause, the Employer to discharge the Charging Party for failure to tender back dues for the period of time from May 1975 through May 1976, notwithstanding that at the time no valid union-security agreement existed between the Employer and Respondent which required membership in Respondent as a condition of employment, in violation of Section 8(a)(3), thereby violating Section 8(b)(2) of the Act.

B. *Violations of Section 8(b)(1)(A)*

Commencing on or about November 17, 1976, Respondent has threatened the Charging Party with discharge from employment for failure to tender back dues for the period of time from May 1975 through May 1976, notwithstanding that at the time no valid union-security agreement existed between the Employer and Respondent which required membership in Respondent as a condition of employment, thereby restraining or coercing the Charging Party in the exercise of his Section 7 rights in violation of Section 8(b)(1)(A) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the Employer'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 and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. We shall order that Respondent cease and desist from encouraging membership in it by causing or attempting to cause, and threatening to cause, the Employer to discharge the Charging Party for failure to tender back dues for the period of time from May 1975 through May 1976, notwithstanding that at the time no valid union-security agreement existed between the Employer and Respondent which required membership in Respondent as a condition of employment, or by discriminating against employees in any other manner in respect to the hire and tenure of employment, or any term or condition of employment, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act. Further, in order to fully rectify the unfair labor practices herein found, Respondent shall be ordered to perform the following affirmative acts:

(1) Send a letter to the Employer advising that it no longer seeks to apply or to enforce the August 27, 1976, settlement agreement with respect to the Charging Party and other employees similarly situated; (2) send a letter to the Charging Party withdrawing its November 17, 1976, threat and informing him that it has advised the Employer that it is not seeking enforcement of the August 27, 1976, settlement agreement with respect to the Charging Party and other employees similarly situated; and (3) post notices where notices to its members are customarily posted, including (but not limited to) the bulletin boards at the Employer's plant where notices to its members are customarily posted, in the form attached to this Decision marked "Appendix."

Upon the foregoing findings of fact and upon the entire record in this case, we make the following:

CONCLUSIONS OF LAW

1. Burroughs Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Association of Machinists and Aerospace Workers, District No. 15, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By its August 27, 1976, agreement with the Employer for the Charging Party's discharge unless he paid back dues at a time when no valid union-security agreement was in effect, Respondent attempted to cause the Employer to discriminate

against the Charging Party in violation of Section 8(a)(3), thereby violating Section 8(b)(2) of the Act.

4. By its letter to the Charging Party dated November 17, 1976, threatening to cause the Employer to discharge the Charging Party for failure to pay back dues at a time when no valid union-security agreement was in effect, Respondent has restrained and coerced the Charging Party in the exercise of rights under Section 7 of the Act and thereby violated Section 8(b)(1)(A) of the Act.

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Association of Machinists and Aerospace Workers, District No. 15, AFL–CIO, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Encouraging membership in it by causing or attempting to cause Burroughs Corporation to discharge Carl Nocera, or any other employee, for failure to pay back dues at a time when no valid union-security agreement was in effect.

(b) In any other manner discriminating against employees in respect to the hire and tenure of employment, or any term or condition of employment, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

(c) Restraining or coercing Carl Nocera, or any other employee, by threatening to cause Burroughs Corporation to discharge him for failure to pay back dues at a time when no valid union-security agreement was in effect.

(d) In any other manner restraining or coercing employees in the exercise of their rights guaranteed them in Section 7 of the Act.

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

(a) Send a letter to the Burroughs Corporation advising that it no longer seeks to apply or to enforce the August 27, 1976, settlement agreement with respect to Carl Nocera and other employees similarly situated.

(b) Send a letter to Carl Nocera withdrawing its November 17, 1976, threat and informing him that it has advised the Burroughs Corporation that it is not seeking enforcement of the August 27, 1976, settlement agreement with respect to him and other employees similarly situated.

(c) Post in their offices and meeting halls and at company bulletin boards copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by the authorized representatives of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members 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.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[5] 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

WE WILL NOT encourage membership in our Union by causing or attempting to cause Burroughs Corporation to discharge Carl Nocera, or any other employee, for failure to pay back dues at a time when there was no valid union-security agreement in effect.

WE WILL NOT in any other manner discriminate against employees in respect to the hire and tenure of employment, or any term or condition of employment, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

WE WILL NOT restrain or coerce Carl Nocera, or any other employee, by threatening to cause Burroughs Corporation to discharge him for failure to pay back dues at a time when no valid union-security agreement is in effect.

WE WILL NOT in any other manner restrain or coerce employees of Burroughs Corporation in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL advise the Burroughs Corporation by letter that we no longer seek to apply or to enforce the August 27, 1976, settlement agreement with respect to Carl Nocera and other employees similarly situated.

WE WILL send a letter to Carl Nocera withdrawing our threat of November 17, 1976, and informing him that we have advised the Burroughs Corporation as set forth above.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT No. 15, AFL–CIO