

**A. O. Smith Corporation and Mark Seiler.** Case 30-CA-4638

June 1, 1979

## DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO  
AND TRUESDALE

On March 28, 1979, Administrative Law Judge David S. Davidson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed 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 has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

### ORDER

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

### DECISION

#### STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge: Pursuant to a charge filed on April 7, 1978, by Mark Seiler, an individual, the complaint issued on May 26, 1978, alleging that the Respondent, A. O. Smith Corporation, violated Section 8(a)(3) of the Act by reducing certain rates of pay because of employees' union or protected, concerted activities. The complaint was amended at the hearing to allege further that Respondent further violated Section 8(a)(1) of the Act by the statement of a supervisor to employees that incentive rates on their machines would not have been cut if a grievance had not been filed over the rate on another machine. In its answer, Respondent denies the commission of any unfair labor practices.

A hearing was held before me at Milwaukee, Wisconsin, on November 8, 1978. At the conclusion of the hearing oral argument was waived and the parties were given leave to file briefs, which have been received from the General Counsel and Respondent.

Upon the entire record in the case, including my observation of the witnesses and their demeanor, I make the following:

### FINDINGS AND CONCLUSIONS

#### I. THE BUSINESS OF RESPONDENT

Respondent manufactures automobile frames at its Milwaukee, Wisconsin, location, where it annually purchases and receives materials valued in excess of \$50,000 from points outside the State of Wisconsin. I find that Respondent is an employer engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

#### II. THE LABOR ORGANIZATION INVOLVED

Smith Steel Workers, Directly Affiliated Labor Union 19806, AFL-CIO, herein referred to as the Union, is a labor organization within the meaning of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Facts*

Respondent's production and maintenance employees at its Milwaukee plant have been represented for many years by the Union under successive collective-bargaining agreements. The dispute in this case arises out of a change in incentive rates on three machines in department 1737, one of Respondent's punch-press departments.

There are essentially two kinds of incentive rates applied in the plant to incentive jobs. Supervisors' rates, also known as Code 4 rates, are established by foremen at the outset of new jobs without the aid of an industrial engineering analysis or timestudy. Industrial engineering rates, known as I.E. rates, are established by the industrial engineering department. Normally an I.E. rate is set after startup problems associated with a job have been eliminated and a normal pattern of operation has developed. To arrive at an I.E. rate, industrial engineers observe the job, reduce it to its basic elements, timestudy it, and level the timestudy results. After an I.E. rate has been developed, it is given to the job's production supervisor, who with his superiors decide whether to apply the I.E. rate to the job in place of the supervisors' rates. It is company policy to replace supervisors' rates with I.E. rates as quickly as possible, but there have been instances in which supervisors' rates have remained in effect for a number of years.<sup>1</sup> Once an I.E. rate has been applied to a job it may be changed only if there is a change in the operation which tends to increase or decrease production. Establishment and application of an I.E. rate may be grieved and taken to arbitration under the contract. With certain exceptions not material to this case, any adjustment in a rate as a result of a grievance is retroactive to the date the rate was first applied.

<sup>1</sup> After an I.E. rate is applied to a job, there are still occasions when on a daily basis the supervisors' rate may be applied because of temporary job problems or conditions which interfere with normal production.

There are 12 machines of varying design and capacity in department 1737 called decoilers, referred to in the department and in this Decision by their numbers. They uncoil steel from large rolls, run it through punch presses, and stamp out blanks from the steel for use as stock in Respondent's production operations. Each time a coil is loaded into a decoiler, the operators start the operation by feeding the coil into the punch press and operating it manually until the press is loaded to the point that it may commence automatic operation. As a coil runs out, the operators must again move the last portion of the coil into the press and operate it manually. The incentive rates on these machines consist of three parts corresponding to the three phases of operation. A "coil in" rate for the initial loading and manual operation, a rate for the period of automatic operation, and a "coil out" rate for the final portion of the operation.

As of early 1977 the "coil in" and "coil out" portions of the rates on Nos. 9, 10, and 12 were supervisors' rates which had been in existence since those decoilers were placed in operation several years earlier.<sup>2</sup> In the spring the industrial engineering department developed I.E. rates for the "coil in" and "coil out" operations on these three decoilers and transmitted them to Dennis Gaines and Ken Ploeckelman, the day-shift foremen for department 1737. After examining them, Gaines and Ploeckelman concluded that the I.E. rates were too low and so reported to superintendent Harris. Harris said he would check the matter out and would get back to them. They did not put the I.E. rates into effect, but asked Harris about once a month thereafter whether he had heard anything further about the rates. Each time Harris replied that they were still under investigation.

On September 23, 1977, the operator of No. 3 decoiler on the third shift filed a grievance complaining that the "coil in" and "coil out" rates applied to his decoiler, which were I.E. rates, were too low because of deterioration of the decoiler. As of November 1977 this grievance was pending in the third step of the procedure.

On November 28, 1977, at a daily production meeting attended by Respondent's acting superintendent, Al Dobersek, who was substituting for the absent Harris, the general supervisor of production control asked why production on the No. 3 decoiler was low. Dobersek said that he would investigate and find the answer.<sup>3</sup> Dobersek went to department 1737 and asked Ploeckelman for an explanation. Ploeckelman said that they were having a problem with respect to the rate on No. 3, that the operator wanted it

brought up to the supervisors' rates which were being applied on the Nos. 9, 10, and 12 decoilers, and that production on No. 3 had slowed down pending resolution of that issue. Dobersek asked if there were I.E. rates established for 9, 10, and 12, and Gaines said that there were but that they had not been applied because he and Ploeckelman disagreed with them. Dobersek told them he would get back to them later and went to ask the industrial engineering supervisor to go over the I.E. rates for Nos. 9, 10, and 12 with him. After reviewing them Dobersek decided that they should be applied. Dobersek returned to the decoiler department where he told Gaines and Ploeckelman to apply the I.E. rates to Nos. 9, 10, and 12 in order to standardize the department. Dobersek said that the rates were bound to be grieved and that they could go through the grievance procedure and get the matter resolved much faster and come to an agreement.

The next morning, at the start of the first shift, the I.E. rates were applied to Nos. 9, 10, and 12, and the first shift operators immediately filed a grievance protesting that the new rates were inadequate and not properly timeliness.

When the second shift operators arrived for work at about 3 p.m. a group of them gathered in the washroom before the start of work. Among them were Euclid Lewis and Reacy Armstrong, who operated Nos. 9 and 10 on the second shift. Ploeckelman was also present, washing his hands at the end of his shift. Several comments were made about the new rates and Ploeckelman's role in applying them. Someone asked when other rates would be cut, and Ploeckelman said that they could not be cut because they were I.E. rates. Ploeckelman then said that one of the reasons they had put the I.E. rates in effect on Nos. 9, 10, and 12 was because the operators wanted to get the rate on No. 3 raised to the rate on No. 9, which was a foreman's rate. One employee asked if they had cut the other rates to keep from raising the rates on No. 3, and Ploeckelman said, "You didn't think we were going to bring the rate up on 3, did you?"<sup>4</sup>

As Lewis and Armstrong left the washroom they met second-shift steward Seiler, told him what Ploeckelman had said, and asked if that was proper. Seiler said he did not think so and suggested that they file a grievance with Ploeckelman, which they did on the following day, protesting

<sup>2</sup> A fourth decoiler, No. 6, not at issue in these proceedings, also had supervisors' rates regularly applied to it. It is not clear from the record how long it had been in operation or whether an I.E. rate had been developed for it by the industrial engineering department at the time of the events at issue herein.

<sup>3</sup> Dobersek testified that he believed Gaines had been at the meeting but had left before the problem in his department was discussed. Gaines testified that Ploeckelman attended the meeting and told him that the production on No. 3 had been questioned at the meeting. Ploeckelman testified that Dobersek came to his department and with Gaines present asked why production was low. Although the differences in their versions raise credibility questions, the testimony of all three is the same as to the substance of their conversations, and the passage of time between the events and the filing of the charge makes it likely that they would have forgotten details relating to these events by the time they were first called upon to remember them. I find that the conflicts are not cause to generally discredit these witnesses and have relied generally on the testimony of Dobersek and Ploeckelman whose recollections were similar and appeared to be more complete than that of Gaines.

<sup>4</sup> Ploeckelman, Lewis, and Armstrong testified as to what was said in this conversation, and steward Seiler testified to what Armstrong and Lewis told him immediately after the conversation. Seiler's version of what he was told about the conversation is almost identical with what Armstrong testified was said, but there are differences between Armstrong's version and Lewis' version, as well as between their testimony and Lewis' affidavit, which was offered in evidence as past recollection recorded when Lewis became confused on redirect examination and appeared to go blank. Ploeckelman's testimony differs in some respects from all other versions, but Lewis' affidavit is closer to Ploeckelman's testimony in some respects than to the testimony of Armstrong and Seiler. In the most critical aspect of the conversation, all are agreed that Ploeckelman related the introduction of the I.E. rates on Nos. 9, 10, and 12 to the dissatisfaction with the rate on No. 3. Bearing in mind the inevitable differences in recollection after the passage of a year's time, I have credited Ploeckelman as to his initial comment relating the new rates to the dissatisfaction with the rates on No. 3 and find that he did not specifically mention the grievance filed with respect to No. 3, as Lewis' March 1978 affidavit also indicates. However, I find that he did make a second statement, not mentioned in his testimony but mentioned by the others, challenging their credulity if they believed that Respondent would raise the rate on No. 3.

that the rates on Nos. 9, 10, and 12 had been cut in retaliation for the grievance filed to raise the rate on No. 3.

At the time of the hearing in this case that grievance, as well as the grievances over the rates on Nos. 3, 9, 10, and 12, were unresolved and pending in the grievance procedure.

### B. Concluding Findings

The principal issue in this case is whether, as the General Counsel contends, Respondent cut the "coil in" and "coil out" rates on decoiler Nos. 9, 10, and 12 in retaliation for employee protests over the rate on decoiler No. 3, and/or a grievance filed over that rate 2 months earlier. There is no question that Respondent had the right under the collective-bargaining agreement to replace supervisors' rates with I.E. rates at any time. But it was not free to do so in retaliation for the exercise of employee rights to protest rates or to file grievances.<sup>5</sup>

There is no question that there was a connection between the employees' protest of the rate on the No. 3 decoiler and the change in the rates on Nos. 9, 10, and 12. When Dobersek sought an explanation of the low production on No. 3, Ploeckelman and Gaines related the low production to the operator's complaint about the rate on No. 3 and tied that complaint to the continued use of higher supervisors' rates on Nos. 9, 10, and 12. Thus, the conclusion is warranted that employee dissatisfaction, to which Dobersek's attention was drawn by the question about low production on No. 3, led to the inquiry about the rates on 9, 10, and 12 and to their change.<sup>6</sup> However, more is required to warrant the conclusion that the change in the rates on Nos. 9, 10, and 12 was motivated by a desire to retaliate against employees for expressing their dissatisfaction.

There is some evidence to support the General Counsel's contention. The I.E. rates for Nos. 9, 10, and 12 had been submitted to Ploeckelman and Gaines more than 6 months before November 28. They had declined to apply those rates because they thought they were too low. They had sought guidance from Superintendent Harris and had received no further information or instruction despite monthly inquiries. Yet without waiting for Harris, for whom Dobersek was substituting, to return from a temporary absence, Dobersek ordered the rates put into effect within hours of learning of employee unhappiness over the rates on No. 3. Ploeckelman's statement to the employees in the washroom is a direct concession that the complaint over the rate on No. 3 was one of the causes for applying the I.E. rates to Nos. 9, 10, and 12. Although the reason Dobersek started his inquiry was low production on No. 3, the action taken by him not only was unlikely to increase production on No. 3, but by his own testimony was likely to cause a decline in production on Nos. 9, 10, and 12 as well. Thus,

an inference of retaliatory motivation can be drawn from the precipitate timing of the change in rates on Nos. 9, 10, and 12 after Dobersek learned of the complaint over rates on No. 3, the admission that the complaint over the rate on No. 3 was one of the causes of the change, and the seeming inconsistency between the cause of Dobersek's inquiry and the action he took as a result of what he learned.

However, the inference weakens when the facts are viewed in a broader context. There has been a long bargaining history between the parties, a collective-bargaining agreement developed and refined over the course of many years, and a grievance procedure which employees have utilized for many years. There is no evidence, apart from that claimed to appear in Ploeckelman's washroom statement, that Respondent entertained or demonstrated any animus against the Union or employee concerted activities. There is no showing that the operators of Nos. 9, 10, and 12 were in any way involved in the complaint about the rate on No. 3 or that their production had in any way been impaired as a result of that complaint. The relationship of their rates to the slowdown came only from the fact that supervision believed that the higher supervisors' rates on Nos. 9, 10, and 12 contributed to the unhappiness over the I.E. rate on No. 3. It was Respondent's policy, albeit with glaring exceptions, to replace supervisors' rates with I.E. rates as quickly as possible, and although the effort had lagged, the industrial engineering department had proposed such rates for Nos. 9, 10, and 12 long before the grievance over No. 3 was filed.

Thus, at the time of the events here at issue there were two issues which required ultimate resolution and which Dobersek found were related. First was the low production on No. 3 which supervisors attributed to the complaint about its rate, and second was the delayed application of I.E. rates to Nos. 9, 10, and 12 which supervision believed fed the unhappiness over the rate on No. 3. While the solution adopted by Dobersek seemed designed to aggravate the problem over the short run, it held more promise for the long run because it promised to end the disparity between the I.E. rate on No. 3 and the supervisors' rates on Nos. 9, 10, and 12 and put both problems on the track for ultimate resolution through the grievance procedure. Ploeckelman's statements to the employees in the washroom admit no more than that Respondent sought to protect the rate on No. 3 and reduce the rates on Nos. 9, 10, and 12 when the unhappiness over the rate on No. 3 called the attention of management to the continuation of supervisors' rates on Nos. 9, 10, and 12.<sup>7</sup> Ploeckelman's statements admit relation and causation, but not retaliatory motive.

I conclude in these circumstances that the inference of retaliatory motive is not strong enough to outweigh the evidence that the rates on Nos. 9, 10, and 12 were made for business reasons to conform with company policy and to bring about ultimate resolution of the rate issues pending in department 1737. Accordingly, I shall recommend dismissal of the allegation that the change in rates on the No. 9, 10, and 12 decoilers violated Section 8(a)(3) and (1) of the Act.

<sup>5</sup> *Allis-Chalmers Corporation*, 229 NLRB 190 (1977).

<sup>6</sup> While Dobersek testified that he did not learn of the grievance over the rates on No. 3 until after November 29, he clearly learned from Ploeckelman and Gaines that employees were unhappy about the rate on No. 3, and, as he testified, normally employees hold back on production until a grievance is filed and the matter is settled. Thus, whether or not Dobersek knew that a grievance had been filed, he had reason to believe a grievance over the rate on No. 3 was likely, and Ploeckelman and Gaines knew that one had already been filed.

<sup>7</sup> Lewis' testimony, although confused, indicates that Ploeckelman told the men in the course of the washroom conversation that the continuation of the supervisors' rates on Nos. 9, 10, and 12 never would have been noticed if the grievance on No. 3 had not been filed.

In these circumstances, I find further that Ploeckelman's statements in the washroom were not threats of reprisal, but merely communicated what was the fact, that dissatisfaction with the rate on No. 3 called management's attention to the continuation of the supervisors' rates on Nos. 9, 10, and 12 and caused the I.E. rates to be applied to those decoilers. I shall therefore also recommend dismissal of the allegation of violation of Section 8(a)(1) based on Ploeckelman's statements.

#### CONCLUSIONS OF LAW

1. A. O. Smith Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The General Counsel has failed to establish that Re-

spondent has engaged in unfair labor practices as alleged in the complaint.

Upon the basis of the above findings of fact and conclusions of law and the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

#### ORDER<sup>8</sup>

The complaint is dismissed in its entirety.

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<sup>8</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. 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.