

Acme Construction Company, Inc. and Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 9-CA-4266

December 15, 1967

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS
FANNING AND BROWN

On October 19, 1967, Trial Examiner Arthur M. Goldberg issued his Decision in the above-entitled case, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

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 Trial Examiner and hereby orders that Respondent Acme Construction Company, Inc., Skelton, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

TRIAL EXAMINER'S DECISION

ARTHUR M. GOLDBERG, Trial Examiner: Upon a charge filed on May 2, 1967,¹ by Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Teamsters or the Charging Party) the complaint herein issued on July 27. The complaint alleged that Acme Construction Company, Inc. (herein called Acme

or the Respondent) had suggested to employees that they bargain directly with Respondent, promised employees wage increases, suggested that employees form a company-dominated union, and had interrogated employees concerning union activity. Respondent's conduct was alleged to have violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act). Respondent denied all the material allegations of the complaint.

All parties participated in the hearing in Beckley, West Virginia, on September 26, and were afforded full opportunity to be heard, to introduce evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. Oral argument was waived and briefs were filed by Respondent and the General Counsel. Respondent's motion to dismiss the complaint, on which I reserved ruling, is disposed of in accordance with my findings below.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The complaint alleged, the answer admitted, and I find that Acme Construction Company, Inc., is a West Virginia corporation engaged in the manufacture and sale at wholesale of ready-mix concrete and blacktop and also performs road work at and from its Skelton, West Virginia, operation. During a representative 12-month period Respondent, in the course and conduct of its business, had a direct inflow of goods and supplies in interstate commerce valued in excess of \$50,000, which were shipped to its Skelton plant from points outside the State of West Virginia.

Respondent 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 and meets the Board's standards for asserting jurisdiction.

II. THE LABOR ORGANIZATION INVOLVED

Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. The labor relations history

On September 27, 1963, District 50, United Mine Workers of America, on behalf of its Local Union 14509, entered into a collective-bargaining agreement with Respondent. That contract excluded from its coverage "engineering, clerical employees, timekeepers, superintendents, assistant superintendents, general foremen and supervisors in charge of any classes of labor." The agree-

¹ Unless otherwise noted all dates herein were in 1967

ment made membership in the Union a condition of employment for all employees covered by its terms and further provided for a checkoff of the dues of union members. The collective-bargaining agreement expired on September 30, 1966.

The Teamsters filed a petition on July 12, 1966, seeking a Board-conducted representation election among Respondent's employees.² The United Mine Workers intervened in the representation proceeding. The Regional Director's Decision and Direction of Election issued on September 28, 1966. Among other things the Regional Director found that Buster A. DeHart, dispatcher, Ernest Lee Spencer, road foreman, and Everett Shumate, plant and yard foreman, were supervisors within the meaning of Section 2(11) of the Act.

Acme's request for review filed with the Board on October 5, 1966, was denied on October 20, 1966.

To the time of the hearing in this proceeding the election had not been held due to the refusal of Respondent to supply, though subpoenaed to do so, the list of employee names and addresses as directed by the Decision and Direction of Election pursuant to the Board's decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236.³

Since April 26 and to the time of the hearing herein, employees of Respondent have been on strike.

2. Acme's operations

Respondent supplies blacktop (asphalt) and ready-mixed cement at wholesale and bids on paving jobs with those materials as well. There are at least three buildings at Respondent's plant site, an office building, a garage, which is about 25 yards from the offices, and the blacktop plant, which is located "a couple or three blocks" from the office building.⁴

The blacktop plant is closed during the winter months and, while operating, is serviced by two employees, the blacktop operator and a laborer. Everett Shumate spends a part of his working day at the plant. During the winter the operator and laborer are laid off. There are no offices in the plant.

Acme operates a number of trucks, as many as 14 mixers having been in use in recent years. To service this equipment Respondent maintains a garage in which two mechanics are employed full time. As well, Shumate is in the garage during the working day.

Acme President Doris Francesa, Secretary-Treasurer Theodore W. Anderson, and Plant Superintendent Martin have their offices in the office building. Bids for paving jobs are prepared by Anderson and Francesa, with Anderson going out to jobsites to estimate the requirements. Road crews on the paving jobs are under the direction of Ernest Spencer and, while on the job, these crews are visited by Anderson and Martin.

B. The Supervisory Status of Everett Shumate

The sole issue of substance raised in this proceeding was the supervisory status of Shumate. If, as contended by General Counsel, Shumate is a supervisor within the meaning of the Act then Respondent is responsible for certain of his acts. On the other hand, if Shumate is not possessed of the attributes of supervisory authority, then no remedial order may be based on his actions.

Shumate, an employee of Respondent for 21 years, is a skilled mechanic. For at least 15 years Shumate has been designated as foreman and the employees were told of his designation.⁵ In October 1966 Respondent posted a notice over the timeclock listing the Company's chain of command. After the three corporate officers, the plant manager, and the dispatcher, the names of Spencer and Shumate were listed as foremen.

Anderson, Acme's secretary-treasurer, testified that he met each morning with Shumate and Spencer at which time the work to be done that day was outlined. Thereafter, Anderson expected Shumate and Spencer to see that the other employees got that work done and expected the other employees to follow the orders given to them by the foremen. In Anderson's absence he depends on Shumate to give orders. [M]ost of the time when [Anderson's] not there . . . it's just routine carrying out the job." If employees were improperly performing their assignments the foremen were empowered to correct the men. However, the foremen had to turn to Anderson to enforce their directions that an employee correct his errors.

Though most employees punched the timeclock Shumate did not. His pay was computed on the basis of a fluctuating workweek while all but one of the yard, plant, and garage employees were paid an hourly wage.⁶ Shumate worked or was on vacation with pay 52 weeks out of the year while the blacktop plant operator and the laborer were laid off during the winter when the plant closed down.

As noted, under the terms of the collective-bargaining agreement between Respondent and the United Mine Workers "supervisors in charge of any classes of labor" were excluded from contract coverage. Further, all employees covered by the agreement were required to be members of the United Mine Workers and were subject to dues checkoff. However, Shumate was not a member of that Union and dues were not deducted from his pay.

Employee Lacey Welch, laborer in the blacktop plant, testified that when he was hired by Bibb, the former plant superintendent now deceased, he was told to go to the plant where Shumate would show Welch what to do on the job. When overtime was to be worked Welch was so advised by Shumate. Similarly, when Welch was to go home early it was Shumate who told him to leave.

² Case 9-RC-6903.

³ See *N.L.R.B. v. Hanes Hosiery Division*, 384 F.2d 188 (C.A. 4), "Disclosure to the union of their names and addresses is not an interference with the employees' right to organize as guaranteed by Section 8(a)(1) of the Act, 29 U.S.C. 158 (a)(1). In truth it is an assist to this end."

⁴ Testimony of Acme President Doris Francesa.

⁵ While an individual's supervisory or nonsupervisory status depends on his authority as shown by the evidence, his title or designation may properly be given some weight in resolving the matter. *The Madison Courier, Inc.*, 162 NLRB 550; *Vitro Laboratories, Division of Vitro Corporation of America*, 140 NLRB 790, 802, 804.

⁶ Under a fluctuating workweek an employee is salaried. The actual hours worked in any week are divided into the salary to determine an hourly rate for that week and one half that hourly rate is added to the salary for each overtime hour worked. See *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572. Other than Shumate, five Acme employees were paid on the basis of a fluctuating workweek; two office employees; Spencer, the other foreman; the dispatcher; and one mechanic employed in the garage. I do not find that the inclusion of the mechanic in this group blunts the distinction created by paying those listed a salary while all other employees are hourly rated. See *Northern Virginia Steel Corp. v. N.L.R.B.*, 300 F.2d 168, 172 (C.A. 4).

Welch explained that he would report to the plant each day but could not clock in until told to do so by Shumate. On some mornings Shumate would tell Welch there was no work for the day and to go home. Other days Welch waited for hours before Shumate told him to clock in for the day. At times Shumate told Welch to leave his work at the blacktop plant and to drive a truck, empty the asphalt tank, or do other jobs around the yard. When Welch failed to maintain the proper heat in the plant furnace Shumate directed him to adjust the heat level.

Employee Lawrence Davis, whose tenure with Acme exceeds that of Shumate, testified that Shumate had told him to work overtime and has moved him from job to job in the yard. Davis agreed that he is not put to work every day he reports to Respondent. On days when there is no work Davis was told by Shumate to go home and Shumate has sent word to Davis when he is to report back to work.

Employee McNeal testified that he brought gripes about his work to Shumate. Employee Voiers, a mixer truckdriver, stated that from time to time Anderson would tell him to drive a dump truck instead. However, it was Shumate who told Voiers which truck to drive. On one occasion Shumate reprimanded Voiers for failure to properly check the transmission of his truck, saying if Voiers could not take proper care of the equipment Shumate would get someone who could.

Welch and Davis testified that Francesa, Anderson, and Plant Superintendent Martin spent little time in the yard. The three supervisors came into the yard infrequently and for brief periods of time. All employee witnesses testified that they understood Shumate to be a supervisor.

Anderson, Respondent's only witness, testified that he assigned the duties of the individual employees and that Shumate did not have authority to hire or fire, to lay off or to recall from layoff, to promote or otherwise reward or discipline an employee. Shumate can recommend that Anderson hire or fire an employee. However, Anderson testified, other employees can make such recommendation and do so "every day." Anderson stated that it was he who determined the employees to be laid off and that such employees were recalled to work by a call from Francesa, himself, or an office employee.

Other than their conclusionary denials that Shumate is a supervisor, the description of his duties as testified to by Francesa and Anderson is not in substantial conflict with the picture painted by the employee witnesses.⁷ Where Anderson's testimony conflicts with that of Davis, for example, who said it was Shumate who called him back to work, or that of Welch and Davis that Anderson spent little time in the yard, I do not credit Anderson whose testimony was elicited by leading questions. Moreover, the testimony of the several employee witnesses was mutually corroborative.

All things considered, I find that Shumate's duties place him within the definition of a supervisor under the Act.⁸ In reaching this determination I particularly note

Anderson's testimony that Shumate is expected to see that other employees accomplish the work outlined at Anderson's regular morning meetings with the two foremen and that the employees are expected to follow Shumate's orders. I find that Shumate responsibly directed other employees in the performance of their work assignments. *Corrie Corporation of Charleston v. N.L.R.B.*, 375 F.2d 149, 155 (C.A. 4); *N.L.R.B. v. Greenfield Components Corporation*, 317 F.2d 85, 88 (C.A. 1); *Nitro Super Market, Inc.*, 161 NLRB 505. Though his finding did not "finally and conclusively" resolve for the purpose of this proceeding the issue of Shumate's supervisory status, I accord "persuasive relevance" to the Regional Director's determination in the prior representation proceeding that Shumate was a supervisor who exercised independent judgment in directing the work of individuals under him. *Security Guard Service, Inc.*, 154 NLRB 8, 10-13, enfd. 384 F.2d 143 (C.A. 5); *N.L.R.B. v. Rish Equipment Company*, 359 F.2d 391, 392 (C.A. 4). Like the Regional Director I find that Shumate was possessed of other indicia of supervisory status. Among those were: attendance at regular morning meetings with Anderson and Spencer at which the work for the day was outlined (*N.L.R.B. v. Bonnie Enterprises, Inc.*, 341 F.2d 712, 715 (C.A. 4); *N.L.R.B. v. Southern Airways Company*, 290 F.2d 519, 524 (C.A. 5); *N.L.R.B. v. Greenfield Components Corp., supra*); employees had been told Shumate was a supervisor and they regarded him as their supervisor (*Keener Rubber, Inc. v. N.L.R.B.*, 326 F.2d 968, 970 (C.A. 6), cert. denied 377 U.S. 934; *N.L.R.B. v. Greenfield Components Corp., supra*);⁹ Shumate reprimanded Voiers for failing to properly maintain his truck and reprimanded Welch for maintaining an improper heat level in the plant furnace (*N.L.R.B. v. Ertel Manufacturing Corporation*, 352 F.2d 916, 918 (C.A. 7), cert. denied 383 U.S. 945); Shumate does not punch the timeclock as do other employees and is paid a salary based on a fluctuating workweek rather than an hourly wage (*Corrie Corporation of Charleston v. N.L.R.B., supra*); Shumate was not required to join the Mine Workers under the union-shop clause in the contract between Respondent and that Union (*MacCollum Paper Co., Inc.*, 155 NLRB 900, 906, enfd. 367 F.2d 761 (C.A. 7)); assignment by Shumate to Davis of equipment to be used and transferring Welch and Davis from job to job in the yard (*N.L.R.B. v. Mt. Clemens Metal Products Company*, 287 F.2d 790, 791 (C.A. 6)); and, Shumate recommended that action be taken by Anderson when employees failed to carry out the foreman's instructions (*N.L.R.B. v. Roselon Southern, Inc.*, 382 F.2d 245 (C.A. 6)).

C. Interrogation, Promise of Benefit, and Encouragement to Form a Company Union

Employee John McNeal testified that in mid-November 1966 Shumate asked if the employees had held any union meetings. After McNeal replied that they

⁷ Francesa was called as an adverse witness by General Counsel.

⁸ Section 2(11) of the Act spelling out the definition of a supervisor "is to be interpreted in the disjunctive . . . and the possession of any one of the authorities listed . . . places the employee invested with this authority in the supervisory class." *Ohio Power Company v. N.L.R.B.*, 176 F.2d 385, 387 (C.A. 6), cert. denied 338 U.S. 899.

⁹ Unlike the memorandum addressed only to those named in it in

General Tire & Rubber Company Chemical Plastics Division, 149 NLRB 474, 477, cited by Respondent, the notice listing Shumate as a foreman was communicated to the employees with Anderson's approval by posting at the timeclock used each day by the employees to record their time, and represented to the employees Acme's "regular straight line" chain of command.

had not done so as yet, Shumate suggested that the employees get together and see Francesa and Anderson. Shumate said the employees would receive a raise and could have "a little union of [their] own." The foreman characterized the Teamsters as being too big a union for Acme.

In January, Shumate again asked McNeal if any union meetings had taken place and what the employees planned to do about the Union. McNeal replied that he didn't know what would be done, but that a meeting would be held soon. Shumate suggested that the men take the "deal" he had suggested before, there would be no loss of work and everything would operate better.

Several days later Shumate again asked what the men had decided concerning the Union. McNeal replied that he would go along with the majority of the men, whichever way they went on the union question. Shumate told McNeal that the Teamsters would ruin Acme. Again urging that the men go directly to Francesa and Anderson, Shumate said they could "fix up a little contract" and eliminate the need for a union. McNeal demurred, saying that a union was needed to keep things straight at Acme.

Employee Donald Voiers testified that in April, Shumate asked him why the employees wanted the Teamsters to represent them. Voiers replied that Respondent had not treated the men well but if run "right" there was no need for a union at Acme. Shumate told Voiers that the Teamsters would put the Company out of business.

Respondent put on no defense relating to Shumate's statements to the employees. McNeal and Voiers testified in a credible manner and neither witness by demeanor nor by any inconsistency in the testimony offered gave me reason to discredit his un rebutted testimony. Accordingly, I find that Shumate, a supervisor within the meaning of the Act, whose status as a supervisor was made known by Respondent to all the employees, interrogated employees concerning their own and the union adherence of other employees, promised the employees benefit if they would abandon the Union and deal directly with Respondent, and urged the employees to form a company union. By this conduct Respondent violated Section 8(a)(1) of the Act. *General Automation Manufacturing, Incorporated*, 167 NLRB 66; *Abex Corporation—Engineered Products Division*, 162 NLRB 328; *Colo. Well Service, Inc.*, 163 NLRB 707.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Respondent's activities set forth in section III, above, occurring in connection with its operation as set forth in section I, above, have a close, intimate, and substantial relation 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 engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take

certain affirmative action designed to effectuate the policies of the Act.

I cannot agree with Respondent's contention raised in its brief, "that, under the circumstances of this case, effectuation of the policies of the Act [does not require] the issuance of a remedial order." Cf. *M. C. Inc., d/b/a Poca Super Market*, 164 NLRB 1080. Shumate's unlawful activities directed against the Union did not balance out prior illegal action in its behalf as did the actions of the supervisor in *M. C. Inc., supra*. Moreover, in this case Acme did not "[manifest] a completely neutral attitude towards the employees' union organization" (*M. C. Inc., supra*), a strike followed close on the heels of Shumate's last threat and for a year resolution of the question concerning representation has been thwarted by Respondent's rejection of the statutory scheme.

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

CONCLUSIONS OF LAW

1. Acme Construction Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of the Act.

3. By engaging in certain described conduct referred to hereinabove in section III, C, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed to them in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

The Respondent, Acme Construction Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from interrogating employees about their union sympathy and activity and that of fellow employees; promising employees benefit if they would bypass the Union and deal directly with the Employer; urging the employees to form a company union; or in any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by the Act.

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

(a) Post at its Skelton, West Virginia, installation, copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's authorize representative, shall be posted by the Respondent, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to

Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order"

¹⁰ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States

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.

(b) Notify the Regional Director for Region 9, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.¹¹

¹¹ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT question employees about their union activity and sympathy or the union activity and sympathy of other employees.

WE WILL NOT urge our employees to form a company union.

WE WILL NOT promise benefit to our employees if they will bypass the Union and deal directly with the Company.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in 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 and all such activities, 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 in Section 8(a)(3) of the Act, as amended.

ACME CONSTRUCTION COMPANY, INC.
(Employer)

Dated _____ By _____ (Representative) _____ (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407, Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202, Telephone 684-3686.