

American Smelting and Refining Company and International Union of District 50, Allied and Technical Workers of the United States and Canada ¹ Case 28-CA-1945

May 28, 1970

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On January 30, 1970, Trial Examiner Herman Marx issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices 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 Charging Party filed exceptions to the Trial Examiner's Decision and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, 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,² 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 the Respondent, American Smelting and Refining Company, Silver Bell, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

¹ We have been administratively advised that since the issuance of the Trial Examiner's Decision herein District 50 United Mine Workers of America has amended its constitution to change its name to that as listed in the caption.

² Although we agree with the Trial Examiner's conclusion that the filing of the grievance involved herein was not shown to have been delayed because the employees were intimidated by Edmonson's remarks we do not find it necessary and we do not pass upon his conclusions with respect to the power of the Board to issue an order directing the processing of such a grievance.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

HERMAN MARX, Trial Examiner. The complaint alleges that an employer, American Smelting and Refining Company (herein the Respondent or Company), has violated Section 8(a)(1) of the National Labor Relations

Act¹ (herein the Act) by threatening employees with reprisals if they filed grievances against the Company.²

The Respondent has filed an answer denying the commission of the unfair labor practices imputed to it in the complaint.

Pursuant to notice duly served upon the Respondent and Charging Party by the General Counsel of the National Labor Relations Board (herein the Board), a hearing on the issues was held before me in Tucson, Arizona, on December 16, 1969.

The General Counsel and the Respondent appeared through respective counsel, and all parties were afforded a full opportunity to adduce evidence, examine and cross-examine witnesses, and submit oral argument and briefs. The evidence in the case is undisputed.

Upon the entire record, and my observation of the witnesses, I make the following findings of fact:

FINDINGS OF FACT

I NATURE OF THE RESPONDENT'S BUSINESS, JURISDICTION OF THE BOARD

The Company is a New Jersey corporation, maintains a place of business at Silver Bell, Arizona, where it is engaged in operating a copper mine and related facilities, employs personnel in such operations, and is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.

During the year immediately preceding the issuance of the complaint, the Company, in the course and conduct of its business in Arizona, mined, sold, and distributed products valued in excess of \$50,000, shipped products valued in excess of that sum from its said place of business in Arizona to locations in other states, and received within the said State, from sources located outside thereof, goods, equipment, and other materials worth in excess of \$50,000. By reason of such interstate transactions, the Company is, and has been at all times material to the issues, engaged in interstate commerce and operations affecting such commerce, within the meaning of Sections 2(6) and (7) of the Act. Accordingly, the Board has jurisdiction over the subject matter of this proceeding.

II THE LABOR ORGANIZATION INVOLVED

International Union of District 50, United Mine Workers of America (Ind.), the Charging Party in this proceeding (herein called the Union), is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

¹ 29 U.S.C. 151 *et seq.*

² The complaint was issued on October 9, 1969, and is based upon a charge filed by International Union of District 50 United Mine Workers of America (Ind.) on September 5, 1969, and an amendment of the charge filed on October 6, 1969. Copies of the charge, the amendment thereof, and the complaint have been duly served upon the Respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Prefatory Statement*

The Union has been the bargaining representative of a unit consisting of all the Company's Silver Bell production and maintenance employees (with some exceptions not pertinent here) for some 15 years, and, in that capacity, has a written contract with the Company, in effect at all times material here, prescribing terms and conditions of employment for the represented employees.

Only two areas of the contract, articles 4 and 9, dealing respectively with vacation pay and the processing of grievances, require special mention. Article 4 provides, in part, that employees who have been employed for prescribed minimum periods, and who have worked at least a specified number of days in the preceding year, are entitled to one or more weeks of paid vacation time, varying with the length of the given employee's tenure. The amount of a "week's vacation pay" is computed by a method prescribed by article 4 (and unnecessary to elaborate here) on the basis of a minimum workweek of 40 hours and a maximum one of 48. Article 9 spells out successive procedural steps to be taken in processing grievances providing, among other things, that a grievance be initially submitted by the complaining employee to his foreman within 48 hours after the ground of complaint arose; that if not satisfactorily adjusted at that level within 24 hours, as a second step, the grievance "be reduced to writing and signed by the employee . . . during the fourth twenty-four hour . . . period, and . . . be submitted to the proper department head . . . who shall give his decision within forty-eight . . . hours"; that upon failure of adjustment at the second level, as a third step, the Union's "Grievance Committee" (established under the contract) shall, within 48 hours after receipt of the department head's decision, "submit the written grievance to the superintendent in charge of operations . . . who shall within five . . . days render his written decision"; that any "unadjusted grievance not carried to the next highest step in the grievance procedure within the (specified) time limits . . . shall be considered as settled on the basis of the last decision"; and that if a grievance remains unadjusted under the prescribed procedure, either contracting party may, within 10 days after the decision of the superintendent, initiate arbitration procedures set forth in the contract.

For some years, the Company has employed the services of an independent contractor (herein Boyles) for drilling operations on its Silver Bell property to explore mineral deposits there. In 1968, and for a period extending thereafter into the summer of 1969, the Company detailed three of its hourly rated Silver Bell employees, J. B. Henley, Jimmy James, and Ed Holman, and a "resident geologist" on its staff, Robert Edmondson, to work with the contractor in processing mineral samples for subsequent analysis. While so engaged, the four men retained their employment status with the Company. Henley, Holman, and James are still in its employ,

although no longer working with Boyles, and Edmondson has left the Company since the material events involved here to resume university studies. Throughout their assignment to work with Boyles, Henley, Holman, and James worked under the supervision of Edmondson who was, at all times material here, an agent of the Company, and by force of his supervision of the three employees, a supervisor within the meaning of Section 2(11) of the Act.

While on the assignment with Boyles, Henley, Holman, and James, like Boyles' employees, worked a 6-day week of 48 hours, although substantially the rest of the Company's Silver Bell labor force worked a 5-day week of 40 hours.

In May 1969, Holman, who had recently received his vacation pay, told James that he had been paid on the basis of a 5-day week (of 40 hours, as I infer) although working a 6-day week of 48 hours on the Boyles assignment. James, who had been in the Company's employ for about nine years, was entitled to a paid vacation of 2 weeks, and both he and Holman, believing that vacation pay for them should be computed on the basis of their current 6-day, 48-hour workweek, decided to talk to Edmondson about the matter. They did so later that day, and Edmondson said that he would look into the subject.

Shortly thereafter, he discussed the question with Donald R. Jameson, superintendent of the Company's Silver Bell operations, and the latter told Edmondson that the Company's Silver Bell labor force generally worked a 5-day week of 40 hours, and that it was thus the Company's policy to compute vacation pay for all employees on that basis.

Within a day or two thereafter, Edmondson told James, in substance, that he had taken the matter up with the superintendent, and that the latter had said that the employees in question could probably secure vacation pay computed on the basis of a 6-day (48-hour) workweek if they filed a grievance, but if they did that, their workweek would be reduced to 5 days (40 hours). Later that day or the next, Edmondson, again purporting to quote Superintendent Jameson, told Henley and James much the same thing, adding in substance, that the drilling program would last about 5 or 6 months more, and that a reduction to a 5-day week would cost the employees more than the additional vacation pay they were seeking.³

James took his vacation in June 1969, and Henley, who, like James, was entitled to two weeks, did so the following month, each receiving vacation pay for two 5-day (40-hour) weeks.

³ Indicating some uncertainty, Henley expressed the belief that Holman was also present when Edmondson made the relevant remarks to him and James. Apparently describing the same episode, James, also evidencing some uncertainty, stated that another employee of the Company, Jerry Martin, was present. In any case, there is no dispute that Edmondson made the relevant remarks on the first occasion to Holman and James, and on the second at least to Henley and James. The end results here are the same whether or not Holman or Martin was present on the second occasion.

On about August 19, 1969, the Union's grievance committee chairman, Wayne Thomas, submitted to the Silver Bell management a written grievance, executed by himself, Henley and James, alleging that Henley, Holman, and James had not received vacation pay due them, but Superintendent Jameson, who was present at the time of submission, rejected the grievance as untimely.

B. Discussion of the Issues; Concluding Findings

The General Counsel sees an abridgement of the employees's Section 7 guarantees in Edmondson's remarks to them regarding grievances on the subject of vacation pay. The Respondent, in its brief, views the remarks as lawful, to that end reading into them an intent by Edmondson merely to inform the three employees involved that the Company did not agree with their interpretation of the contractual vacation pay provisions, but that if they were right the management might "have to reschedule the workweek (from 6 to 5 days) as it would not make sense from an economic point of view to compute the vacation pay on a 6-day week basis."

But Edmondson's intent is immaterial; what matters is the content of his remarks, and the interpretation the employees could reasonably place upon them. What he said, in material effect, was that the three employees in his charge would suffer a reduction in their workweek if they filed a grievance. This was as much as to tell them that the Company would reduce their earnings if they exercised the grievance rights given them by their collective-bargaining agreement. That such an exercise is protected by Section 7 is too plain to warrant added discussion and, obviously, too, the relevant remarks by Edmondson would have a natural tendency to interfere with, restraint and coerce employees in the free exercise of such Section 7 rights. I find, in sum, that by reason of such remarks, which were imputable to the Respondent because of Edmondson's agency and supervisory status, the Company violated Section 8(a)(1) of the Act.

The Respondent, visualizing in its brief the possibility of such a finding, maintains that notwithstanding it, no remedial order is warranted because the violation was "isolated and involved a very few employees in a large bargaining unit." The General Counsel, on the other hand, seeks not only the customary cease-and-desist order, but a direction to the Respondent to process the written grievance, which concededly was submitted to the management after the time specified in the contract. The basis for this request, as expressed at the hearing, is that Edmondson's remarks "intimidated" the employees, thus leading them to delay submission of the grievance beyond the time provided by article 4 of the collective-bargaining contract.

The General Counsel, who has filed no brief, cites no authority to support his request, and that should occasion no surprise, for the remedy sought is extraordinary. Interpretation of contractual terms is, of course, not beyond the Board's province in a proper case,

as the Supreme Court made clear in *N.L.R.B. v. C & C Plywood Corporation*, 385 U.S. 421, 427, but acceptance of the General Counsel's position would entail much more. Whatever the terms used to describe the process, what the Board would be doing, in substance, would be to render an adjudication that because of the alleged "intimidation" the contractual time limitation for filing the written grievance is not binding upon the employees and the Union; that in such circumstances, the Company is obligated to process the grievance as though it had been submitted in time, and has violated that obligation; and that, therefore, the Board may direct such processing. Put another way, the Company's legal obligation to process grievances exists only in the contract, and what the General Counsel seeks, in effect, is specific performance of the obligation upon the premise, implied at least, that the rejection of the grievance, in the circumstances presented, constituted a breach of the obligation.

But to impose such a requirement upon the Company would be as much as to grant a judicial remedy which rests within the province of the Federal courts under Section 301(a) of the Labor Management Relations Act, 1947 (Taft-Hartley Act; 29 U.S.C. §185).⁴ The very grant of jurisdiction to the courts over "suits for violation of (collective-bargaining) contracts" argues forcefully against the existence of any right in the Board to make the order in question, albeit couched in terms of reparation of an unfair labor practice. And that view of the matter is reinforced by the legislative history of the Taft-Hartley Act, which as the Supreme Court pointed out in *C & C Plywood* (at 427); demonstrates a congressional determination to withhold from the Board "general jurisdiction over all alleged violations of collective bargaining agreements."

However, it would be an abstraction to use this case as a vehicle for determination whether the Board has the power which the General Counsel would have it exercise, and I pass the matter without decision, for it is enough for disposition of the General Counsel's request that his threshold claim that the written grievance was delayed because the employees were "intimidated" by Edmondson's remarks is not borne out by the record. It is one thing to say that the natural tendency of the remarks would be to interfere with, restrain, and coerce the employees in the exercise of their relevant Section 7 rights, and quite another to conclude that there was a causal connection between Edmondson's remarks and the failure by the employees and their bargaining representative to comply with the time requirements prescribed by the contract. The very fact that the written grievance was filed, although about three months late, operates in some measure against the claim that the failure to comply was due to Edmond-

⁴ Sec 301(a) provides "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

son's remarks. But more to the point, Henley gave testimony to the effect that he and James, at least, mistakenly believed that they had 6 months within which to submit the written grievance, and "thought that later we could open this thing up if we decided to." And, in addition, there is some intimation in Henley's testimony that Holman (who did not testify) shared that conception.⁵

There is good reason to conclude that all three employees simply delayed in submitting the written grievance because of a mistaken belief that they had 6 months in which to do so, and it would be nothing but a guess to say that the delay stemmed from "intimidation" produced by Edmondson's remarks. Such a guess, obviously, is no basis for a direction that the Company process the grievance, whatever view one may take of the Board's jurisdiction to make such an order.

However, I do not agree with the Respondent's thesis that no remedial order of any kind is warranted. To be sure, Edmondson was a minor supervisor; his conduct involved but two incidents, each consisting of remarks of substantially similar purport, made to only a few employees, who constitute but a small proportion of the bargaining unit;⁶ there is no evidence of a history of prior unfair labor practices at the Silver Bell facilities; and the Company and the Union have a long standing collective-bargaining relationship; but these considerations do not, in my judgment, outweigh the important fact that Edmondson purportedly quoted and spoke for Superintendent Jameson; and that so far as appears, neither the superintendent nor any other representative of the management has ever disavowed Edmondson's remarks or given any other assurance to the employees that their exercise of contract rights will not meet with reprisal at the hands of the management.

As matters stand now, at least some of the employees have good reason to believe that notwithstanding the existence of the collective-bargaining relationship, the top management echelon at the Silver Bell facilities has such a punitive attitude, and there is no assurance

that that belief, even though initially held only by the few to whom Edmondson made his remarks, will not spread from them to many others in the bargaining unit. Thus to prevent or mitigate spread of the belief, and to nullify it where it now exists, it appears to me, on the particular facts of this case, that effectuation of the policies of the Act requires the entry of an order directing the Respondent to refrain in the future from misconduct of the type found above, with appropriate provisions for posting of copies on its Silver Bell premises for the information of its employees. Accordingly, I shall recommend such an order.⁷

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described 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 the Respondent has engaged in unfair labor practices violative of Section 8(a)(1) of the Act, I shall recommend below that the Respondent cease and desist from the unfair labor practices found, and take certain affirmative actions designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following conclusions of law:

1. The Company is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.

2. The Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

⁵ Henley testified:

Q. (By Mr. Cherry) Did you [Henley] talk with Mr Jimmy James and Mr Holman about this subject? [Emphasis supplied.]

A. Yes, sir. As I said before, we talked about it among ourselves.

Q. Did you talk about filing a grievance over this?

A. Yes, we did.

Q. And what was the discussion about? Tell us what was said.

A. We talked about this thing. Mostly, Mr James and myself We decided that we would go along with the thing for a time We thought that we had—we discussed whether or not we had six months to appeal—I don't know how to say this—the wage—

Q. Your vacation pay?

A. The vacation pay, yes. We thought that later we could open this thing up if we decided to.

⁶ The record does not establish the number of employees in the unit, but it is worth nothing that the Silver Bell facilities include a copper mine, crusher, and concentrator; that the contract (schedule A) lists and provides wage scales for approximately 60 separate classifications of employees; and that there appears to be a substantial managerial hierarchy, including a superintendent and department heads subordinate to him, at the facilities. Taking these factors into account, it is fairly inferable that Henley, Holman, and James are but a small fraction of the employees in the bargaining unit.

⁷ In reaching this result, I have given consideration to cases where the Board has withheld a remedial order because the misconduct involved was of a *de minimis* nature. Suffice it to say that this case is distinguishable on its particular facts.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that American Smelting and Refining Company, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Warning, threatening, or otherwise informing any employee in any manner, directly or indirectly, that any term or condition of employment may or will be withheld, denied, or altered in any manner if any employee files or submits any grievance involving any term or condition of employment to the Company or any representative thereof.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any rights guaranteed them by Section 7 of the said Act.

2. Take the following affirmative actions which, I find, will effectuate the policies of the Act:

(a) Post in conspicuous places at its place of business in Silver Bell, Arizona, including all places where notices to employees are customarily posted, copies of the said notice attached hereto. Copies of the said notice, to be furnished by the Regional Director of the Region 28 of the National Labor Relations Board, shall, after being signed by the said Company or its duly authorized representative, be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter in such conspicuous places. Reasonable steps shall be taken by the said Company to insure that said notices are not altered, defaced, or covered by any other material.⁸

(b) Notify the said Regional Director, in writing, within 20 days from the receipt of a copy of this Decision,

what steps the Respondent has taken to comply therewith.⁹

⁹ In the event that this recommended order is adopted by the Board, this provision shall be modified to read "Notify the said Regional Director, in writing, within 10 days from the date of this order what steps the Respondent has taken to comply therewith"

APPENDIX

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

We hereby notify our employees that:

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board has found that we have violated the National Labor Relations Act, and has ordered us to post this notice. The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purposes of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities

WE WILL NOT warn, threaten, or otherwise inform any employee, in any manner, directly or indirectly, that any term or condition of employment will be withheld, denied, or changed in any way if any employee files or submits to us any grievance involving any term or condition of employment.

WE WILL NOT in any like or related manner interfere with any employee's exercise of any of his rights described above.

AMERICAN SMELTING
AND REFINING COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

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.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building and US Court House, 500 Gold Avenue, Room 7011, P.O. Box 2146, Albuquerque, New Mexico 87101, Telephone 505-843-2555.

⁸ 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, recommendations, 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. In the event that the Board's order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board"