

K. O. Steel Casting, Inc. and United Steelworkers of America, AFL-CIO. Case 23-CA-2675

September 4, 1968

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS FANNING
AND ZAGORIA

On January 3, 1968, Trial Examiner Lloyd Buchanan issued his Decision in the above-entitled case, 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 Respondent filed exceptions to the Trial Examiner's Decision 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 briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

The Trial Examiner found that the Respondent discharged Juan J. Aranda because of his union activities in violation of Section 8(a)(3) of the Act, and that the Respondent violated Section 8(a)(1) of the Act by threatening loss of privileges if the Union came into the plant. We find merit in the Respondent's exceptions to these findings.

1. The Trial Examiner discredited General Counsel's witness, Andres Martinez, as to remarks allegedly made to employees by Respondent's president, Joe Kincaid, except for testimony that Kincaid told the employees "that if the Union got in here, he wasn't going to be able to be such a nice guy anymore; he wouldn't be able to listen to our problems . . . because we had to talk to a union representative about this. He said that his door was going to be closed to us." The Trial Examiner found that this remark was admitted, and violative of Section 8(a)(1). The record shows, however, that Kincaid did not admit saying his door would be closed, but only that if the Union came in "it would break up our home, so to speak, because we would not be dealing together, but would have to deal

through a third party." Contrary to the Trial Examiner, we find that Kincaid's admitted statement did not imply that he would take any action in retaliation against his employees if they selected the Union. Rather, in our view, it was at most a statement of opinion, devoid of threats or coercion, and pertained to a matter relevant to union organization. In these circumstances, we find no violation of Section 8(a)(1) and we shall dismiss this allegation of the complaint.

2. Juan Aranda was employed by Respondent as an air cleaning machine operator at the Respondent's plant in San Antonio from July 1966 to April 10, 1967, when he was discharged. On Friday, April 7, Aranda, who was working on the day shift, returned to the plant during the night shift, at 6.30 p.m.

Aranda testified, in essence, that he went to collect some money a man owed him; failing to collect, he decided to take some names from the timecards for the Union. Foreman Contreras stepped up at that point and asked what Aranda was doing, and he answered that he was taking names, and said, "I'm organizing a union and I'm going to try to talk to everybody to sign up a card for the union." Another man, an "Anglo," came up and stood by Contreras, and Contreras told Aranda in Spanish that he had better look out because this man might tell on him and Aranda said that he did not care. Contreras then told Aranda to leave, so he left.

Aranda testified that on Monday, April 10, Personnel Director Burgin told him that he was going to have to let him go. When Aranda asked him why, Burgin said it was because Contreras had told him twice to leave the plant. Aranda protested that Contreras had told him only once to leave, and accused Burgin of firing him for union activity, but Burgin put his hands over his ears and replied, "I don't want to talk to you or hear what you said." After Aranda left the office, he testified, he asked Contreras, in the presence of three employees to be witness to Contreras' answer and they said they would. One of the alleged three employee-witnesses, Vasquez, testified at the hearing and confirmed Aranda's testimony as to Contreras' alleged admission.

The Respondent presented four witnesses to these events.

Contreras testified that on April 7, at 5 minutes before 7 p.m., when the night-shift employees' 6:30 lunch break would end, he saw Aranda standing in the foundry talking to employees. After the employees returned to work 5 minutes later, he observed Aranda still in the foundry, and told Aranda to get out, that he was not wearing the required

safety equipment. When Contreras made another round of the foundry, he saw Aranda still in the foundry taking names from the employees' punch cards. Contreras asked what Aranda was doing and Aranda said "he was getting names from there." Contreras told him "he had better leave, he was going to get into trouble." Thereafter, Contreras went to Foundry Foreman Ledwig and "told him about it," and Ledwig said to go back and tell Aranda again. Contreras returned with Mike Kirk, an employee, and told Aranda again to leave the building, "but he said he was getting names and he was going to get his union in there." Contreras further testified that when questioned by Aranda the following Monday, he affirmed that he had told Aranda several times to leave the plant.

Both Ledwig and Kirk confirmed Contreras' testimony that he told Aranda several times to leave. Thus, Ledwig testified that Contreras told him he had told Aranda to leave the foundry twice, and Ledwig instructed Contreras to go back and tell him again and that Ledwig would take care of him, or words to that effect. Kirk testified that Contreras came to him and Ledwig, said he had told this young man to leave and he had not left yet, Ledwig told him to go back over there and ask him to leave again. Kirk testified that he went with Contreras, that Contreras spoke to Aranda in Spanish first and then asked him in English to leave, and Aranda left.

Personnel Director Burgin testified that Contreras reported to him what happened, he consulted President Kincaid and Superintendent May, and in view of Aranda's poor absentee record, as revealed by his personnel file, his insubordination, and failure to comply with the safety rules, it was decided to discharge him. Burgin then informed Aranda he was discharged, and although he might have given insubordination as the reason, he did not usually tell people why he fired them. When Aranda accused Burgin of firing him "because I want to start a union here," Burgin replied that he did not want to hear about it and put his fingers in his ears.

The Trial Examiner concluded that the demeanor of the witnesses provided no basis for credibility findings. On the issue of insubordination with respect to whether Contreras told Aranda to leave several times or only once, the Trial Examiner viewed the testimony of Vasquez with "suspicion" but stated that he did not believe Aranda was told several times, but in any event Contreras' own testimony demonstrated he did not consider serious any failure to obey immediately. On this basis the Trial Examiner found the reasons advanced to be pretexts, and the discharge discriminatory.

We do not adopt the Trial Examiner's credibility

determination on the issue of insubordination, as we find it contrary to the weight of the evidence.¹ Thus, the Trial Examiner was not sufficiently impressed by Aranda's demeanor to credit him on that basis, and Aranda's account of the events surrounding his discharge received support only from a witness whom the Trial Examiner regarded with suspicion. On the other hand, the testimony of the Respondent's witnesses was consistent, reasonable, in accord with the probabilities, and, in our view, persuasive. Consequently, no cogent reason appears either in the record or in the Trial Examiner's Decision for accepting Aranda's testimony as the true account of what took place. In these circumstances, it is not for the Board to decide whether Aranda's conduct was considered serious enough to merit discharge, especially where, as here, although the Respondent had knowledge of Aranda's involvement in union organizational activity, there is, as the Trial Examiner stated, no evidence of union animus on the part of the Respondent. Accordingly, although the case raises certain doubts about the reason for the discharge, in the absence of any other violations of the Act, or evidence of hostility toward unionism, we find that the preponderance of the evidence fails to establish that the discharge of Aranda was discriminatorily motivated, and we shall dismiss the complaint in its entirety.²

ORDER

It is hereby ordered that the complaint herein be, and it hereby is, dismissed in its entirety.

¹ See *Que Enterprises, Inc.* 140 NLRB 1001, *Allied Chain Link Fence Company*, 126 NLRB 608 (n. 2).

² The Respondent has moved to reopen the record for the purpose of adding certain evidence allegedly bearing on Aranda's credibility. In view of our decision to find no violation as to Aranda, the proffered evidence is no longer material to the issues in the case, and the motion is therefore denied.

TRIAL EXAMINER'S DECISION

LLOYD BUCHANAN, Trial Examiner. The complaint herein (issued June 23, 1967; charges filed April 14 and June 13, 1967), as amended, alleges that the Company has violated Section 8(a)(3) of the National Labor Relations Act, as amended, 73 Stat. 519, by discharging Juan J. Aranda on or about April 10, 1967, and thereafter failing and refusing to reinstate him, because of his union membership and other concerted activity, and Section 8(a)(1) of the Act by said acts and by threats of loss and discharge if the Union came into the plant or if employees became members of or assisted the Union. The answer, as amended, admits that Aranda was discharged, but denies the allegations of violation including the reasons for the discharge as alleged in the complaint.

The case was tried before me at San Antonio, Texas, on September 27. Briefs have been filed by the General Counsel and the Company, the time to do so having been extended.

Upon the entire record in the case and from my observation of the witnesses, I make the following.

FINDINGS OF FACT (WITH REASONS THEREFOR) AND CONCLUSIONS OF LAW

I. THE COMPANY'S BUSINESS AND THE LABOR ORGANIZATION INVOLVED

The facts concerning the Company's status as a Texas corporation, and the nature and extent of its business, are admitted; I find and conclude accordingly that it is engaged in commerce within the meaning of the Act. I also find and conclude that, as admitted, the Union is a labor organization within the meaning of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Alleged Independent Violation of Section 8(a)(1)*

Union organizational activity was here begun by Aranda immediately after the Company's safety meeting held on the second Wednesday in February. Employee Martinez testified that at the next safety meeting in March (he had earlier placed this in the February meeting), Company President Kincaid referred to himself as "a nice guy" but said that, if the Union got in, he would no longer be a nice guy; he would no longer be able to lend money to the employees or discuss their problems with them; and they would have to speak to their union representative and his door would be closed to them.

The latter remark, admittedly uttered, was a misstatement of the requirements and privileges under Section 9(a) of the Act, and I find and conclude that it constituted a threat of loss of privileges in connection with protected concerted activity. Supported by other witnesses, Kincaid denied that he had referred to lending money and that he had threatened to discontinue doing so. While the number of witnesses called by one side and the other is hardly determinative, I am impressed by the fact that no one was called to support the disputed elements in Martinez' testimony. Even Aranda, the General Counsel's only other witness, did not refer to any such remarks. I find and conclude that this additional alleged threat was not made by Kincaid. While the threat which I have found was not alleged in the complaint, it was fully litigated; indeed, as I have noted, it was admitted.

As with respect to Kincaid's alleged reference to lending money, the record lacks support for Mar-

tinez' testimony that at the March meeting Plant Superintendent May referred to the signing of union cards and told the employees that, if they signed, they might as well walk out the door. Here again we have multiple denials. I find and conclude that May did not so threaten.

There is no testimony to support the allegation of threat of discharge by Foreman Contreras.

B. *The Alleged Violation of Section 8(a)(3)*

Whatever support for a finding of discrimination may be found in findings of interference,¹ the Company's opposition and limited threat found above provide little basis for findings with respect to Aranda's discharge. These latter allegations will be weighed on the testimony received directly with respect thereto.

Admitting that it discharged Aranda when he reported for work on April 10, the Company cites two reasons for the discharge: He had been insubordinate in refusing to leave after he returned to the plant during another shift on Friday, April 7, and he had "a wretched attendance record." It is denied that Aranda was discharged because of his protected concerted activities.

Aranda had worked for the Company since the beginning of July 1966. There is no issue concerning the quality of his work. He had been on the night shift, was now working days, and was told that he would return to the night shift after, Friday, April 7. Having finished his work on the latter date, Aranda returned to the plant during the night shift, at 6:30 p.m., in order, as he testified, to collect a debt from another employee.

Here it should be noted that he was not discharged because he returned when he had no company business to perform; nor even because he was there without the required safety equipment, although the latter fact was cited to him, as we shall see, when he was told to leave. Neither was it because of violation of rules *qua* rules, concerning which there is no issue. In view of the Company's declared reasons for the discharge, we need not consider whether the rules are always observed, a question left open by the testimony of several witnesses, including Contreras. It was Aranda's refusal to leave which allegedly prompted the discharge.

Aside from Aranda's earlier union activities, and whether or not they came to the Company's attention, there being no testimony concerning this latter, company knowledge on April 7 is clear. Having come to collect a personal debt, he lingered to engage in concerted activities as he decided to take the names of employees from the cards at the timeclock; all of the names were on a sheet which was posted there.

Whatever the propriety (this was at no time referred to) of his return for a personal reason and

¹ *N L R B v. Erie Resistor Corporation*, 373 U S 221, 227

his stay to copy names as part of his union activity, he was not charged with transgression therefor and it is not claimed that he was discharged for such actions. Aranda had copied about 35 names in his book when Contreras asked him what he was doing, and he replied that he was taking names to get the men to sign union cards. According to Aranda, when Contreras then told him, as an "Anglo," presumably Foreman Ledwig,² came up, that he had better look out, "this man might tell on you," he replied that he didn't care and would speak at the next safety meeting; and Contreras thereupon told him, allegedly only once, that he had better leave, and he did leave. As we shall see, we have here first an issue of credibility concerning insubordination, and then the question of the seriousness³ of any such insubordination.

Digressing for the moment to consideration of Aranda's attendance record as a stated reason for his discharge, it appears that beginning early in September, about 2 months after he was hired, he was frequently absent, but not unusually so shortly before his discharge. Were it cited by the Company as a mere afterthought, reference to Aranda's absences would inject an element of suspicion into the Company's defense. But here, more serious and basic, the absences were allegedly a contributing factor in the decision to discharge him although he had just been again assigned to the night shift. Yet nowhere does it appear that Aranda had ever been warned concerning excessive absenteeism, or even that his absences were excessive or unusual by comparison with other employees. Now, coincidentally with discovery of his important union activity,⁴ that record was reviewed, found seriously undesirable, and weighed as at least a contributing factor in the decision to discharge although it was not mentioned at the time of discharge.

Returning now to the issue of insubordination, Aranda testified that Personnel Director Burgin told him when he discharged him on Monday morning, April 10, that it was because Contreras had told him twice on Friday to leave the plant; that he replied that Contreras had told him only once and, when he added that he was being discharged because of his organizing activity, Burgin put his hands to his ears and said that he did not want to hear about that, an immediate reaction which suggests that this was not news to him.

The charge that he had been told more than once prompted Aranda, as soon as he got his equipment and made ready to leave, to ask Contreras in the

presence of other employees whether he had told him only once, Contreras allegedly replying in the affirmative. Admitting that Aranda had asked him how many times he had told him to leave, Contreras testified that he had replied, "Several times." Contreras' version was that he had first told Aranda to get out when the latter was talking to employees at work.

Burgin did not tell us of his conversation with Aranda on April 10 beyond his statement that he had bad news for him. he was discharged. Questioned further, he could tell us only that he did not mention safety equipment or absenteeism; he may have mentioned insubordination. He testified further that he did not question Aranda concerning the insubordination; he relied on the reports which he had received.

Employee Vasquez confirmed the testimony that Contreras admitted that he had only once told Aranda to leave. Whether or not the April 10 date had otherwise been recalled to him, Vasquez' testimony that he just recalled it, "it could have been a hot night, or something," casts suspicion on his entire testimony. Yet on the issue of credibility and insubordination with respect to whether Contreras did in fact several times or only once tell Aranda to leave, I do not believe that it was several times and that Aranda anticipated the legal issue in this connection and falsely told Contreras that he would have witnesses to testify that he had admitted that it was only once. Burgin's statement at the time of discharge that Contreras had told Aranda more than once to leave explains the latter's question of Contreras in the presence of witnesses and his early testimony that he was told only once.

In any event, had Contreras told Aranda more than once to leave on April 7, there was no scene or serious issue between the two even according to Contreras' testimony; and any failure by Aranda to obey immediately did not seem even to him to be serious—even if my credibility finding were not accepted. The Company, at most, made a similar evaluation as it now sought to justify the discharge by reference to another pretext: Aranda's absences.

The demeanor of the witnesses has provided no basis for credibility findings. But on the record testimony, I find and conclude that Aranda was discriminatorily discharged because of his union activities.

[Recommended Order omitted from publication.]

² Ledwig testified that he was about 40 feet from Aranda's position at the clock, that Contreras came to him and said that he had twice told Aranda to leave, and variously, that he (himself a foreman, his greater authority not indicated) directed Contreras to tell Aranda "one more time to leave and, if not, [he was] going to talk to him", then, that he told Contreras to tell Aranda "one more time to leave and [he would] take care of him", and that he "would have called the law on him and got him out of there" (This last was not, as Ledwig told us, part of what he said to Contreras.) Questioned again, he testified that he told Contreras to tell Aranda again and, "if he didn't leave, that [he] was going to call the law and get him out

of here" (he did speak to Contreras of calling the law¹), but finally that he did not tell Contreras that he "would call the law on" Aranda, he told him that he "would take care of it," but with respect to calling the law, he was merely "planning" to do that

¹ I do not undertake to pass upon the sufficiency of the insubordination claimed to warrant discharge. But we can properly assess the facts and attendant circumstances as indicative of pretext and warranting the finding that the discharge was actually prompted by Aranda's union activities

⁴ See *Kem Distributing Company*, 158 NLRB 158, 166, cnfd. 389 F.2d 386 (C.A. 5), Oct. 6, 1967