

**Allied Chemical Corporation, Wilputte Coke Oven
Division and William Waters.** Case 13-CA-7957

March 27, 1969

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS
FANNING AND ZAGORIA

On December 13, 1968, Trial Examiner Jerry B. Stone issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in part, remanded and withdrawn in part, and that the settlement agreement in this case be reinstated, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision, together with a supporting brief, the Charging Party filed a brief in support of the exceptions, and the Respondent filed an answering 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, the briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations,¹ with the limited modification in the Order indicated below.

ORDER

Pursuant to the provisions of Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, except that the Board orders that the complaint be, and it hereby is, dismissed in its entirety, and that the settlement agreement in Case 13-CA-7957 be, and hereby is, reinstated.

TRIAL EXAMINER'S DECISION

JERRY B. STONE, Trial Examiner: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, was tried pursuant to due notice on October 21, 1968, at Chicago, Illinois

¹We find no basis for concluding, as alleged by the Charging Party in his brief, that the Trial Examiner's conduct of the hearing, his rulings, or his Decision, were attended by bias or prejudice against the Charging Party. Considering the state of the record as a whole, we have no alternative but to sustain the Trial Examiner's recommendation that the complaint be dismissed.

The original charge and a first amended charge were filed on July 11 and September 5, 1967. The complaint in this matter was issued on August 30, 1968.

The critical issue in this case is whether the Respondent, subsequent to February 14, 1968, refused to recall William Waters because of his nonmembership in the Union at the time of Respondent's refusal to hire Waters on or about July 11, 1967, and/or in an attempt to frustrate concerted protected activities on the part of other employees. The issue is thus whether the Respondent has violated Section 8(a)(3) and (1) of the Act.

All parties were afforded full opportunity to participate in the proceeding. The General Counsel and Respondent have filed briefs in this matter which have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:¹

FINDINGS OF FACT²

I. THE BUSINESS OF THE RESPONDENT

Allied Chemical Corporation, Wilputte Coke Oven Division, the Respondent, is, and has been at all material times herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York, and has maintained its principal office at 40 Rector Street, New York, New York. The instant proceeding involves only the Respondent's construction project located on the property of the Wisconsin Steel Company at Chicago, Illinois.

At all times material herein, Respondent has engaged in the engineering and construction of coke ovens throughout the states of the United States, including its location at the Wisconsin Steel Company at Chicago, Illinois. In the course and conduct of its business operations during the calendar year, a representative period, Respondent purchased and caused to be delivered directly from points outside the State of Illinois to its Illinois construction site at the Wisconsin Steel Company, materials and supplies in excess of \$500,000.

In the course and conduct of its business operations during the past calendar year, Respondent has rendered services valued in excess of \$500,000 to the Wisconsin Steel Company, an interstate corporation, at its Chicago, Illinois, location.

Considering the foregoing, it is found and concluded that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

Although not placed directly in issue by the pleadings, and although the testimony did not reveal the precise name of the Union involved, the evidence overwhelmingly reveals that the employees performing bricklaying work, other than Waters, were members of a "bricklayers" union and that their "cards" were checked on the job. The evidence also clearly reveals that on July 11, 1967, that

¹The credibility resolutions made herein are based upon a composite evaluation of the demeanor of the witnesses and the logical consistency of the evidence.

²The facts are based upon the pleadings and admissions therein, clarification of pleadings narrowing the issues, a stipulation of the parties, and the credited testimony of Burke, Waters, Daniels, and Norman.

Waters was refused employment by the Respondent because he was not a member of said "bricklayers" union and was not cleared by said "union," that the "union" had a union steward on the job who represented the "union" in its dealings with the Respondent with respect to the question of "union membership" or clearance of applicants or employees, and that other employees on the job who were union members around July 24, 1967, engaged in a work stoppage in protest of Waters' employment. It is thus clear that the Union attempted to impose a condition of employment of union membership from the initial date of employment at Respondent's jobsite

III THE ALLEGED UNFAIR LABOR PRACTICES

Preliminary Issues; Supervisory Status

At all material times herein, the following named persons occupied the positions with the Respondent Employer following their respective names, and have been, and are now, supervisors and agents of the Respondent Employer, acting on its behalf, within the meaning of Section 2(11) and (13) of the Act: Don Norman, general superintendent of construction, and Thomas Burke, bricklayers general foreman.

Alleged Unfair Labor Practices; Presettlement — September 29, 1967

Events of July 1967

On July 11, 1967, William Waters, Samuels, and Wheadon appeared at Respondent's Chicago jobsite and applied for work. There they met Bricklayers General Foreman Burke and several union stewards. There were questions by the union steward relating to union membership and clearance. Samuels, who had a union card, was employed. Waters and Wheadon were not employed because they were not union members and not cleared for employment. Waters attempted to explain that he had been a union member but had refused to pay a union fine and therefore was not now a union member. The union steward, Vecellio, told Waters in effect that his problem was with the Union, and that he didn't have anything to do with it. The Bricklayers general foreman refused to hire Waters because he was not a member of the "bricklayers" union.

Thereafter on July 11, 1967, Waters filed the original unfair labor charge in this case. During the week of July 21, 1967, Hatfield, a superintendent for the Respondent, telephoned Waters and asked him if he were still interested in employment with the Respondent. Waters told Hatfield that he was interested in employment with the Respondent. Hatfield told Waters that the Respondent would be happy to process his application. Waters told Hatfield that the Respondent owed him backpay for not having employed him on July 11, 1967, and that he would come to work if so compensated. Hatfield asked Waters to come out to the Company the next day. Waters told Hatfield that he would like to check with the National Labor Relations Board as to what he should do. Hatfield told Waters that it would be all right for him to report to work on July 24, 1967. Waters agreed to do so. Waters told Hatfield that Wheadon, his nephew, had also applied for work on July 11, 1967, and had not been employed for the same reasons, that Wheadon had not as yet filed unfair labor practice charges but could do so. Hatfield

told Waters to bring Wheadon along.

On July 24, 1967, Waters and Wheadon reported for work at Respondent's jobsite and were employed. The next day the union members, bricklayers and ironworkers, on the job walked off in protest. A short time later one ironworker spoke to Waters and tried to question Waters about his "union membership." Waters firmly told the ironworker to leave him alone. The employees returned to work, and Waters continued his employment with the Respondent without significant incident until February 14, 1968.

The August 1967 Layoff; the First Amended Charge

On August 12, 1967, the Respondent had a layoff. Waters was one of the employees laid off. Waters returned to work later. However, on September 5, 1967, Waters filed the first amended charge in this case alleging additional acts of discrimination.

The Settlement Agreement and Related Acts

Thereafter on September 29, 1967, the National Labor Relations Board, by its Regional Director, Ross M. Madden, Region 13, approved a unilateral settlement agreement whereby Waters was made whole for any loss of pay suffered as a result of his not being hired on July 11, 1967.³

On or about January 19, 1968, said Regional Director notified the Respondent that pursuant to the terms of the settlement agreement the case was closed, conditioned upon continued observance of said settlement agreement.

After Settlement Conduct; The Events of February 1968

On or about August 20, 1968, said Regional Director notified the Respondent he was withdrawing his approval of said settlement agreement due to violations of said agreement, and that a complaint would issue based upon the unfair labor practices which occurred both prior and subsequent to said settlement agreement.

In the meantime on or about February 14, 1968, the Respondent, through its general superintendent of construction, Don Norman, and its bricklayers general foreman, Thomas Burke, laid off Waters. At the same time the Respondent laid off about half of its bricklayers. There is no contention and no evidence to the effect that the layoff of Waters was discriminatory in nature.

On February 14, 1968, Waters, when he was informed by an employee of Respondent that he was being laid off as of that date and was offered his paycheck, refused to accept the tendered paycheck.

On February 15, 1968, William Waters reported for work at Respondent's jobsite where he had been employed. Respondent's timekeeper attempted to hand Waters his paycheck at the gate entrance to the jobsite. Waters again refused his paycheck and proceeded to work at the jobsite.

On February 15, 1968, the bricklayers on the job (all of whom were union members) walked off the job. On February 15, 1968, the Respondent notified Wisconsin Steel Works (the jobsite involved) that Waters had been

³As the facts show, Waters had been offered employment and had gone to work on or about July 24, 1967. The settlement agreement and "notice" attached thereto indicated a remedy for the alleged July 11, 1967, conduct. Waters was not a signatory party to this settlement agreement.

laid off and requested Wisconsin Steel Works to exclude Waters from the jobsite.

On or about February 16, 19, and 20, 1968, Waters was precluded from entering the jobsite by local police officials and plant security personnel for Wisconsin Steel Works.

Sometime after the February 14, 1968, layoff by Respondent, all bricklayers laid off, except Waters, were recalled to work. All of the bricklayers recalled were union members.

Motivation as to Respondent's Failure to Recall Waters after February 14, 1968

The critical issue in this case is the motivation of the Respondent in the failure to recall Waters to work after the February 14, 1968, layoff. The General Counsel contends in effect that motivation to discriminate against Waters should be inferred from Respondent's conduct in July 1967 and from the facts revealing union opposition to Waters in July 1967 and in February 1968. The Respondent contends that its motivation was of a nondiscriminatory nature, that it refused to recall Waters because of his insubordination in refusing to accept his February 14, 1968, layoff and in continuing to work and trying to work contrary to layoff instructions. Norman, for the Respondent, testified to the effect that it was his decision to refuse to recall Waters after the February 14, 1968, layoff and that his only reason for such refusal to recall Waters was Waters' insubordination in refusing to accept his February 14, 1968, layoff. Norman's demeanor as a witness was that of a frank, forthright, and truthful witness.

The facts do reveal discriminatory motivation on the part of the Respondent with respect to the refusal to employ Waters on July 11, 1967. In this refusal, Burke, however, testified to the effect that he was not knowledgeable as to the law prohibiting discriminatory consideration in the employment of employees on July 11, 1967. I do not credit his testimony to such effect. I find it hard to believe in this age and time that he did not have some realization on July 11, 1967, that it was illegal to discriminatorily consider employees for employment on the basis of union membership or lack thereof. Burke further testified, and I so credit, that after July 11, 1967, company officials and lawyers informed him of the legal prohibitions on discriminatory considerations in the employment of employees. The conduct of the Respondent in making amends for its July 11, 1967, conduct and in continuing to employ Waters thereafter to February 14,

1968, is consistent with this testimony.

Considering all of the foregoing, I am convinced that all of the facts including Respondent's conduct of making amends for the July 11, 1967, conduct, Waters' conduct on February 14 and the days immediately following, and Norman's truthful demeanor negate the possible inference of discriminatory propensity revealed in Respondent's July 11, conduct.⁴ I conclude and find that Norman's testimony, to the effect that he made the decision to refuse to recall Waters after February 14, 1968, and that his reason for refusing to recall Waters was because of Waters' insubordination on and after February 14, 1968, is to be credited and it is credited. Accordingly, I conclude and find that the evidence does not reveal that the Respondent has violated Section 8(a)(3) and (1) of the Act by the refusal to recall Waters to work after February 14, 1968.

CONCLUSIONS OF LAW

1. Allied Chemical Corporation, Wilputte Coke Oven Division, the Respondent, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The evidence does not establish that the Respondent has engaged in unfair labor practices subsequent to the unilateral settlement agreement approved by the Regional Director for Region 13, National Labor Relations Board, on September 29, 1967. Nor do the facts otherwise establish the failure of the Respondent to comply with the terms of said settlement agreement.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend that

1. The complaint allegations insofar as they relate to Respondent's conduct on and after February 14, 1968, shall be severed from said complaint and dismissed.

2. The complaint allegations insofar as they relate to Respondent's conduct, excepting for the conduct referred to in 1, above, shall, after severance recommended above, be remanded to the Regional Director for Region 13, National Labor Relations Board, for appropriate withdrawal of such complaint allegations.

3. The Regional Director shall reinstate the settlement agreement of September 29, 1967.

⁴I have considered the fact that the other employees laid off and recalled were union members.