Winston Heat Treating, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Cases 9-CA-4948 and 9-RC-7939

June 10, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On April 2, 1969, Trial Examiner William J. Brown issued his Decision in the above-entitled proceeding, finding that 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, Respondent filed exceptions to the 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 made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Decision, the exceptions and brief, and the entire record in this 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 hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that Respondent, Winston Heat Treating, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified.[1]

[1]Insert as the fourth indented paragraph of the Appendix the following.
WE WILL notify Marlin Barger if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

TRIAL EXAMINER'S DECISION

AND

REPORT ON OBJECTIONS

WILLIAM J. BROWN, Trial Examiner: This consolidated proceeding under Section 9 and 10 of the National Labor Relations Act, as amended, hereinafter referred to as the Act, came on to be heard before me at Dayton, Ohio, on February 17, 1969. The charge of unfair labor practices was filed November 1, 1968[1]; thereafter, pursuant to a stipulation for certification upon consent election, the election was held in Case 9-RC-7939 on December 17, resulting in a 7 to 7 tie vote with one ballot, that of the alleged discriminatee in Case 9-CA-4948, challenged. The cases were consolidated by the Regional Director on February 10, 1969, the complaint in Case 9-CA-4948 having issued on December 27. The complaint alleges, and the duly filed answer of the above-captioned Respondent, hereinafter referred to as the Company, denies the commission of unfair labor practices defined in Section 8(a)(3) and (1) of the Act in the discharge of employee Marlin Barger and in the discriminatory withholding of a wage increase due an employee.

At the hearing the parties appeared and participated as noted above with full opportunity to present evidence and argument on the issues. Subsequent to the close of the hearing briefs were received from the General Counsel and the Respondent-Employer, hereinafter referred to as the "Company," and have been fully considered. On the entire record herein and on the basis of my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The pleadings and evidence indicate and I find that the Company is an Ohio corporation engaged in Dayton, Ohio, in the business of tool heat treating. During the calendar year preceding issuance of the Complaint, admittedly a representative period, the Company sold goods valued in excess of $50,000 to Ohio enterprises which in turn sold and shipped directly to customers located outside the State of Ohio goods valued in excess of $50,000. I find, as the Company concedes, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings and evidence indicate and I find that the Charging Party and Petitioner[2] is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES AND THE CHALLENGED BALLOT

The Company commenced operations some time in January, and at all material times operated three shifts around-the-clock with some 15 full-time production and maintenance employees. Its president and general manager, Marshall B. Kilgore, has been in direct charge of operations with supervisory assistance from a shop superintendent, a position which was filled by Curt Johnson until sometime after the election when Hale Barger, brother of Marlin, assumed the position, and with the assistance of leadmen who appear to be nonsupervisory employees with responsibility to oversee operations but without authority to exercise managerial authority.

Marlin Barger was hired by Kilgore[3] and Curt Johnson sometime in March as a tool hardener at a rate of $3.50 per hour. At the outset of his employment he worked the

[1]Dates hereinafter relate to the year 1968 unless otherwise indicated.
[2]The Charging Party-Petitioner is hereinafter referred to as the "Union."
[3]Marlin Barger had previously worked under Kilgore's supervision at

second shift; about July 1, he was transferred to the third shift as a leadman with a wage increase to $4 per hour. About September 23, Barger was removed from the position of leadman on the third shift because of a breakdown of morale on that shift which resulted in the discharge of two employees and the demotion of Barger to the first shift as a straightener at his original rate of $3.50. At that time Superintendent Johnson had interceded for Barger and apparently in protest over Barger's demotion, quit; Barger thereupon contacted the Union, anticipating difficulties as a consequence of his having been the cause of the Company's loss of Johnson, signed a union authorization card on October 19 and secured the signatures of three or four other employees on union authorization cards.

On October 29, Barger worked the day shift and at about 11:30 left the plant with the company truckdriver, one Bocock, to get luncheon sandwiches for a number of fellow employees and thereafter ate his lunch with a group which included Kilgore. Sometime during the day, Kilgore praised his work on a job of straightening some shafts. At 3 o'clock on that afternoon, Barger informed some of his fellow union supporters that it was time to bring the union campaign out into the open; Barger and two other employees put on their union badges. According to Barger, he walked by Kilgore twice with his union badge displayed shortly after 3 o'clock. The badge in question is about 1 5/8 inches in diameter with red, white and blue lettering setting forth the Union name and the exhortation "Join UAW — Vote." At 3:30, Barger was called in to the office and was released. According to Barger, Kilgore told him at the time that there was not enough work available and he would have to be let go for a while; Kilgore's account, however, is that he informed Barger that he had taken 70 minutes for lunch that day and that, coupled with everything else in his background, was the last straw.

The reference to everything else in the background could only relate to the shortcomings of Barger while serving as leadman on the third shift or to the union campaign. In this connection, the evidence indicates that Barger was apparently considerably remiss in his responsibilities with the result that the night shift employees engaged in a letdown in their efforts. There was also a breakdown of discipline with the result that employees brandished weapons, imported a prostitute[4] on one occasion and on another scattered litter over the parking lot and onto the property of a neighboring plant owned by shareholders who are also company shareholders. All the foregoing events occurred, however, at least a month prior to Barger's discharge and I conclude that they were, in effect, at least partially condoned at the time although other employees were discharged at that time.

Although Barger plainly was a disappointment to the Company while he served as leadman on the night shift, I find that in his capacity as a rank-and-file employee of the day shift he had been highly regarded as a capable workman. Thus, I credit the testimony of employee Spencer that only a week prior to Barger's discharge he overheard Kilgore praising Barger for a particular job; I also credit the testimony of Barger that Kilgore praised his work in a straightening operation on which Kilgore himself had experienced difficulty.

The evidence, in short, is to the effect that Barger appears to have displayed both diligence and skill in his job performance, but to have failed as a pusher and to have been guilty of occasional derelictions in attendance. These shortcomings were tolerated until the Company, i.e. Kilgore, acquired knowledge of his support of the Union through Kilgore's observation of the union badge on the afternoon of October 29; in this connection I do not believe Kilgore's denial of knowledge of Barger's union support and I conclude that he saw the union badge and knew its import particularly since the Company had only a day or so prior to the discharge received the Union's letter claiming representative status.

The evidence relating to Barger's discharge appears to amount to a summary discharge purportedly for a trivial infraction of a nature long tolerated and to have occurred shortly after the Company learned of the union campaign and of Barger's role therein. I find that it preponderates in favor of the conclusion that Barger's discharge was in reprisal for his support of the union campaign and was an unfair labor practice within the purview of Section 8(a)(3) and (1) of the Act.

The case also concerns the allegation of the General Counsel that, on or about November 4, the Company interfered with, restrained, and coerced employees in the exercise of their statutory rights to self-organization by withholding a wage increase due an employee because of the employee's support of the Union. The employee in question, Ivon Noble, who left the Company shortly before the hearing, testified that shortly after Marlin Barger's discharge, he inquired of Superintendent Hale Barger as to why he was not receiving an increase of 50 cents per hour previously promised to him. According to Noble, Hale Barger replied that Kilgore was going to cut down on the higher rated men. The following week, Noble inquired of Kilgore about the matter and, according to Noble, Kilgore replied that he feared that if he gave Noble the increase the Union would bring charges of unfair labor practices. Kilgore, testified he informed Noble that the scheduled increase was withheld because he did not want to appear to be influencing votes. I found Noble a credible witness and find that the Company withheld a wage adjustment due him because of the pending union campaign, thereby engaging in an unfair labor practice within the scope of Section 8(a)(1) of the Act. *American Technical Machinery Corporation,* 173 NLRB No. 210.

In view of the finding herein that Marlin Barger was discharged in reprisal for his participation in lawful protected, concerted activity, I find that he at all times retained the status of an employee under the Act, and that challenge to his ballot should be disallowed and his ballot opened and counted.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company set forth in section III, above, and there found to constitute unfair labor practices, occurring in connection with the business operations of the Company 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

another heat treating shop and at the time of his hire by the Company Kilgore stated that he knew of Barger's good work at that employment and expected like work for the Company.

[4]The evidence indicates that a relative of a high company official was responsible for the presence of the prostitute.

such commerce and the free flow thereof.

V. THE REMEDY

In view of the findings set forth above to the effect that the Company has engaged in unfair labor practices affecting commerce it will be recommended that it be required to cease and desist therefrom and take such affirmative action as appears necessary and appropriate to effectuate the policies of the Act, including the offer to Marlin Barger of immediate and unconditional reinstatement to his former or a substantially equivalent position with backpay computed in accordance with the remedial relief policies of *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co., Inc.*, 138 NLRB 715. With respect to the representation proceeding, I recommend it be severed and remanded to the Regional Director with instructions to open and count the ballot of Marlin Barger and issue a revised tally of ballots.

On the basis of the foregoing findings of fact and upon the entire record in this case, I make the following.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By withholding a wage increase normally due an employee and stating the reason therefor to lie in the Union's organizational campaign the Company has engaged in unfair labor practices defined in Section 8(a)(1) of the Act.
4. By discharging employee Marlin Barger in reprisal for his activities on behalf of the Union, the Company has engaged in unfair labor practices defined in Section 8(a)(3) and (1) of the Act.
5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. The ballot cast by Marlin Barger in the election here involved should be opened and counted and a revised tally of ballots issued.

RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case it is recommended that the Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withholding normal wage increases and stating to employees that the reason therefor was the pendency of a labor organization's representation petition;

(b) Discouraging membership in the Union or any other labor organization of its employees by discharging or otherwise discriminating against employees with respect to hire, tenure, or any term or condition of employment;

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to join or assist labor organizations, 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;

2. Take the following affirmative action which appears necessary and appropriate to effectuate the policies of the Act:

(a) Offer Marlin Barger immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for loss of earnings resulting from the Company's discrimination against him in the manner set forth in the section above entitled "The Remedy."

(b) Notify Marlin Barger, if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, upon discharge from the Armed Forces.

(c) Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and give effect to the backpay requirements hereof.

(d) Post at its plant copies of the attached notice and marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 9, shall, after being duly signed, be posted immediately upon receipt thereof, and be maintained thereafter for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that said notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days[6] from receipt of this Decision, what steps have been taken to comply with the terms hereof.

IT IS RECOMMENDED that the representation proceedings be severed and remanded to the Regional Director for the opening and counting of the ballot of Marlin Barger.

[5] In the event this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommendations of a Trial Examiner" in the notice If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "a Decree of the United States Court of Appeals Enforcing an Order" for the words "a Decision and Order."

[6] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 9, in writing, within 10 days from the date of this Order, what steps the 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 withhold wage increases otherwise due on the basis of the pendency of a labor organization's representation proceeding.

WE WILL NOT discourage membership in the UAW or any other labor organization by discriminating against employees respecting hire, tenure or any term or condition of employment.

WE WILL OFFER Marlin Barger immediate and full reinstatement to his former or a substantially equivalent position and make him whole for loss of wages.

All our employees are free to join or assist the UAW or any other labor organization or to refrain from so doing except insofar as their rights may be affected by an agreement entered into in accordance with the Act.

WINSTON HEAT TREATING, 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 Building 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3686.