

**Adam Loos Boiler Works Co. and International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local No. 85, AFL-CIO.** Case 8-CA-5254

June 24, 1969

## DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS  
JENKINS AND ZAGORIA

On April 16, 1969, Trial Examiner Paul E. Weil, 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, 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 brief, and the entire record in this case, and hereby adopts the Trial Examiner's findings,<sup>1</sup> conclusions, and recommendations.

## 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 the Respondent, Adam Loos Boiler Works Co., Toledo, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

<sup>1</sup>The Respondent's exceptions to the Trial Examiner's Decision are in large part directed to his credibility resolutions. We will not overrule the Trial Examiner's resolutions as to credibility unless a clear preponderance of all relevant evidence convinces us that they are incorrect. Such a conclusion is not warranted here. *Standard Dry Wall Products*, 91 NLRB 544, enf'd. 188 F.2d 362 (C.A. 3).

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

PAUL E. WEIL, Trial Examiner: Pursuant to a charge filed by International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local No. 85, AFL-CIO, herein called the Union, against Adam Loos Boiler Works Co., herein called the Respondent, the General Counsel, by the Regional Director for Region 8,

issued the complaint herein on January 9, 1969, alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by discharging and refusing to reinstate Union Steward Nick Toth because he engaged in union and other concerted activities. By its duly filed answer Respondent admitted various jurisdictional facts and admitted that it discharged Nick Toth but denied that the discharge was due in any respect to his activities as a union steward or other concerted activities, alleging that the discharge resulted from Toth's "inefficient and unworkmanlike performance" on a specific job at Lakewood Greenhouse in Toledo, Ohio. Further, Respondent stated that Toth during the year preceding his discharge performed his work in an inefficient, unworkmanlike, careless and negligent manner, expressed a marked dissatisfaction with his job, and continually complained. Respondent denies the commission of any unfair labor practice.

The case was heard on February 26, 1969, at Toledo, Ohio. All parties were represented by counsel and were afforded full opportunity to participate, examine witnesses, and adduce relevant evidence. All parties waived the filing of briefs and each party made oral argument at the close of the hearing.

Upon the entire record in this proceeding including the arguments of the parties made at the hearing I make the following:

### Findings of Fact

#### I. JURISDICTION

Respondent is, and at all times material hereto, has been an Ohio corporation operating an industrial boiler repairing and steel fabrication business at Toledo, Ohio. Respondent in the past calendar year manufactured and distributed products and services valued in excess of \$100,000 of which products and services valued in excess of \$50,000 were furnished to enterprises located within the State of Ohio, which enterprises annually produce and ship goods valued in excess of \$50,000 directly to points located outside the State of Ohio.

Respondent is now 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.

#### II. THE LABOR ORGANIZATION INVOLVED

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

#### III. THE UNFAIR LABOR PRACTICES

##### The Issue

The sole issue herein is whether or not Union Steward Nick Toth was discharged because of his union and concerted activities.

### Findings and Conclusions

Respondent is a family-owned business presently operated by the third generation of the Loos family with A. Carlton Loos functioning as president and general manager. His brother John is vice president and takes

some part in the direction of the business although he is normally engaged in the real estate business. Margaret Woodyard, sister to Carlton and John Loos, works part time as the firm's sole bookkeeper. Steve Loos, nephew of Carlton, is employed by the firm as an apprentice boilermaker.

Carlton Loos testified that he has been engaged in the business for some 35 years, that the Company has been a union shop with its employees represented by the Union since about 1937, and that the shop normally employed four or five employees.

Nick Toth was employed in 1954 and worked continuously for the firm until his discharge on November 11, 1968.

On November 7, 1968, Ronald Kothe, an apprentice who has been employed by Respondent for something over 3 years, telephoned Carlton Loos at his home at 6:20 a.m. and told him that he had to go to Cleveland to make arrangements and attend the funeral of an uncle who had died and that he would be away Thursday and Friday, November 7 and 8. Loos who had been awakened by the telephone call responded, "This is ridiculous" and Kothe responded, "Never mind, I will be in" and hung up. When Carlton Loos got to the plant at 5 minutes before the normal starting time of 8 o'clock he found that Kothe had already been there and had left. The following Sunday evening, November 10, Loos testified that after attempting to reach Kothe by telephone, he went to his home and told Kothe not to come to work the next day. Loos testified that "I figured if he could take a couple of days off, he might as well have another day off" and explained that he was provoked because Kothe had said he would be in and did not wait for him on Thursday morning. On cross-examination Loos testified that he was not angry and that on thinking it over he thought it was all right that Kothe took off 2 days to go to the funeral. He testified that he did not lay Kothe off because of slack work.

After Kothe's interview with Loos on Sunday evening Kothe called Nick Toth in his capacity as shop steward and asked him what to do. Toth advised him that inasmuch as he lived near the plant he should come in on Monday morning and they would find out what the trouble was.

On Monday morning all of the employees gathered at the shop about 7:40. When Carlton Loos arrived and saw Kothe, he became angry and told him he was not working. Toth asked why Kothe was not working if Steve Loos was working since Steve Loos had less seniority than Kothe. Carlton Loos answered, "That has nothing to do with it. I told him he is not working and he is not working and that is it!" The employees decided among themselves not to clock in at 8 o'clock. Carlton Loos came back out of his office and said, "It's time to go to work, it's 8 o'clock." The employees told him that they didn't ring in whereupon Loos turned to another employee, Dick Koester, and asked him what he was doing there and said that he had been laid off.

Koester responded that he had not been told that he was laid off and Loos admitted that he had neglected to tell him that he was laid off and said, "As long as you are here for today you can work today but you're still laid off." He then walked out of the shop again. The employees decided they wouldn't work until they had called the union hall, whereupon Toth walked through the shop to the telephone and called the business agent, Russell Woods. Loos came out of his office and asked

whether the employees were going on strike and Toth answered, "No, we're not going to strike. All I'm going to do is call Russell Woods to straighten this out." Woods came to the shop in a short time and after talking with the employees was closeted with Loos. He returned to the employees and told them that Loos was not going to let Kothe work that day whereupon all the employees decided that they were "sick" and went home.

The same evening about 6:30 Carl<sup>1</sup> Loos telephoned Toth at his home and said, "This is Carl. Nick, you are discharged." Toth asked why and Loos answered, "You are just discharged. That is it." A few days later the business agent and assistant business agent of the Union together with Toth met with Carl and John Loos at the Union's office. At this time Carlton Loos said that he fired Toth because of the Lakewood Greenhouse job because it took too long to do the work that was done on the job. He also mentioned in this meeting an occasion when a machine was damaged by Toth some 2 years before and a job in Sandusky, Ohio, during the preceding winter with which he was dissatisfied. John Loos commented in the meeting that there was a lot of tension between the men in the Company and everything seemed to be deteriorating and that in the last year Carl Loos and Nick Toth seemed not to hit it off together. Toth said that was because he was the shop steward and Loos said that Toth was disagreeing all the time about this and that and griping every day. Apparently nothing came of the meeting whereupon the charges in the instant case were filed by the Union.

Nick Toth testified that he first became shop steward in 1964. He testified that in the 2 years preceding his discharge he had made a number of complaints to the employer about employees being shorted on their pay and overtime not being split according to a gentlemen's agreement as well as about an occasion or occasions when employees learned that nonemployees had been doing work in the plant on weekends. He testified that Loos reacted angrily to his complaints. Loos on the other hand testified that no grievances had ever been filed by the Union prior to Toth's discharge. Thereafter grievances were filed by the Union with regard to a dispute on overtime pay as well as the layoff of Ron Kothe. Neither of these grievances had been discussed between the Union and the employer up to the time of the hearing. It became apparent through the hearing and through the testimony of Carl Loos that he was referring only to written grievances. Grievances brought to him verbally by Toth were, in his mind, complaints and griping. Mrs. Woodyard testified, for example, that she occasionally made mistakes in the payroll and that Toth would come in, as the steward, and speak for the employees with respect to such matters and that she would attempt to straighten them out. Carlton Loos also testified that Toth made complaints many times but that he was not aware of any grievances.

#### The Alleged Reason for the Discharge

Carlton Loos testified that when the employees walked out on November 11 he decided to use the time to catch up with his book work in the company office. During the morning he went over the billings for several jobs and came upon the timesheet for the Lakewood Greenhouse job which showed a total of 152 hours spent retubing a boiler. He testified that he believed the job should not

<sup>1</sup>Carlton Loos is apparently usually called Carl.

have taken more than 75 to 85 hours and decided that he should discharge Toth who had been in charge of the retubing. He testified that he had been present on the job almost every day and that he had never complained to the employees that they were working too slowly although complaints had been made to him by the owner to that effect. He also testified that he did not break down the timesheet on the job to ascertain how many of the 152 hours were attributable to Toth's work on the job.<sup>2</sup> Although employee Koester worked on the job with Toth he did not discipline him for his part in the job. Loos testified that he was not aware of any special problems on the job and knew of no reason why it should have taken so long other than that Toth did not work efficiently. On cross-examination he admitted that his firm had never had a retubing job on a boiler such as that at the greenhouse and that it required a somewhat different procedure than the retubing jobs normally done. He admitted also that he had had to furnish a special impact wrench and air compressor to remove the plugs which held the tubes in place in the boiler and that a tube spreader taken out to the job was found not to be usable and had to be replaced by another one which he ordered for the purpose. He testified that the boiler was in good condition because it was quite new and accordingly there could have been no problem due to rust or scale but admitted that he had not been inside the boiler to determine this fact. Loos also testified that his nephew, Steve, had worked 1 day on the job and did not deny Toth's testimony that Toth told him that he had no use for Steve on the job and there was nothing for him to do. He admitted that he could not point to any specific part of the job that took too long and that he didn't think much about the progress about the job until it was finished, although he was on the job almost every day.

Toth testified that there were a number of circumstances on the greenhouse job that required an unusual expenditure of time. For instance normally they would have broken out a wall of firebrick but in this case they took the bricks out separately because they were of a special nature and piled them carefully so that they could be used over again. He testified that some 14 to 17 of the plugs were so situated that the impact wrench could not be used and a crescent wrench was used which took about 10 times longer. He said that a considerable amount of time was expended unnecessarily, for instance by the assignment of Steve Loos for a day, by sending a truckload of tubes to the job at a time when they could not be used and had to be sent back, and by the fact that some 20 or 25 of the plugs broke when they were being removed.

#### Discussion and Conclusions

The real issue is whether or not Toth was discharged because of his union activity. It is no part of my function to determine whether the employer was justified in discharging him because of the greenhouse job; if he was discharged for that reason no violation is made out whether or not his discharge is just. It is relevant however to determine if possible whether the reason given for the discharge by Respondent is pretextual, that is to say, whether under normal circumstances an employee would have been discharged for the reason given. If I were to find that the alleged reason is pretextual it would lend corroboration to General Counsel's theory.

Respondent contends that it has had a long, peaceful existence with the Union and has never made any attempt to dislodge it as the representative of Respondent's employees. It points to the fact that no antiunion animus, as the phrase is normally understood, is shown in the instant case. Respondent's attempt to substantiate this position is based to some extent upon its argument that no grievances were ever filed prior to Toth's discharge. However Respondent can argue this position only by ignoring the fact that most grievances, by its own testimony, were resolved prior to a point in time where they would normally have been filed in writing.

The grievance provision of the contract does not require that any grievance shall be written, or follow any specific format. Toth frequently voiced grievances that were not put in writing. To the extent that such grievances resulted from failure of the employer to pay wages in accordance with the contract, it appears that they were normally remedied by Mrs. Woodyard without further ado. That no formal procedure had to be invoked scarcely proves that no grievances were stated. Toth complained about working conditions and contract breaches on various occasions both to Mrs. Woodyard and to Carl Loos. Carl Loos considered that Toth's "complaints" constitute nothing more than complaining and griping and he did not dignify them in his mind to the extent of admitting that they were contractual grievances. As a result he formulated a dislike for Toth and, as he told employee Koester, intended to fire Toth whenever he felt that he had grounds that would stand up.

Employee Kothe testified that Loos had told him that he would sure love to get rid of Nick Toth but Nick was a good worker and had so many years that he couldn't do so but that he didn't especially care for Nick.<sup>3</sup>

Respondent admitted in its answer that Nick Toth is qualified and competent but contends that he performed his work in an inefficient, unworkmanlike, careless, and negligent manner, he has expressed a marked dissatisfaction with his job, and he continually complained. It appears therefore that Respondent's dissatisfaction with Nick Toth did not result from his incompetence. On the contrary he was a competent and efficient workman. It appears also that Respondent was looking for an opportunity to discharge him and the evidence predominates that its dissatisfaction resulted from Toth's activities as shop steward. Given this situation, under the circumstance of the strike that took place on the morning of November 11, it is quite clear that Respondent determined to discharge Toth as the leader of the strike and because of his actions as shop steward, relying on the alleged excess expenditure of time on the greenhouse job. Admittedly, until the strike took place,<sup>4</sup> Respondent had no intention of discharging Toth. Respondent points to the intervening circumstance of Loos' working on the timesheets of the greenhouse job. However I cannot accept Respondent's conclusion that this was the real cause for the discharge in view of the fact that although Loos was in constant touch with the job he at no time noticed or determined that it was not progressing satisfactorily. As he did not break down the timesheet, he was not then or at any time since aware of

<sup>3</sup>Although Carlton Loos appeared on the witness stand he did not contradict the testimony of either Kothe or Koester. Accordingly I credit their accounts of the statements they attribute to him.

<sup>4</sup>There can be no doubt that the work stoppage was a strike although the employees for reasons known only to them chose to testify that they were sick. This is incomprehensible in view of the fact that there is no no-strike clause in the contract.

<sup>2</sup>In fact Toth appears to have worked 65 1/2 hours

the portion of the job attributable to Toth's work. I believe that Carlton Loos, faced by a walkout of all of his employees (including his nephew Steve Loos) attributed it, probably correctly, to Toth. When this factor conjoined with his review of the worksheet for the greenhouse job I believe that he felt that he could successfully defend the discharge of Toth and determined then and there to effectuate it. But for Toth's activities as a shop steward in the past and the strike on that occasion I do not believe that he would have been discharged. Accordingly I believe that he was discharged because of his union and concerted activities and that his discharge violated Section 8(a)(3) and (1) of the Act. I shall recommend therefore that an appropriate order be issued.<sup>5</sup>

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship 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 an unfair labor practice by the discharge of Nick Toth I shall recommend that it cease and desist therefrom and that it take certain affirmative action which I find necessary to remedy and remove the effects of the unfair labor practice and to effectuate the policies of the Act. I recommend that Respondent offer Nick Toth immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of the discrimination against him by payment to him of a sum of money equal to that he would have earned as wages during the period from November 11, 1968, to the date on which Respondent offers reinstatement as aforesaid, less his net earnings, if any, during the same period. The loss of pay under the order recommended shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

#### CONCLUSIONS OF LAW

1. By discharging Nick Toth because of his union and concerted activities Respondent did discriminate and is discriminating in regard to hire or tenure or terms or conditions of employment of employees, thereby discouraging membership in the Union thereby engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

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

#### RECOMMENDED ORDER

It is recommended that Adam Loos Boiler Works Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Union or any other labor organization by discriminatorily discharging or refusing to reinstate employees because they engaged in lawful concerted activity or union activity or in any other manner discriminating in regard to hire to tenure of employment or any term or condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Nick Toth immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of pay he may have suffered because of the discrimination against him in the manner set forth in the section entitled "The Remedy."

(b) Notify Nick Toth 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.

(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 the amount of backpay due under the terms of this Recommended Order.

(d) Post at its Toledo, Ohio, plant copies of the attached notice marked "Appendix."<sup>6</sup> Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to 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.

(e) Notify the Regional Director for Region 8, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.<sup>7</sup>

<sup>5</sup>Respondent adduced evidence that Toth had worked improperly and inefficiently in a job in Monroe, Michigan, shortly prior to his discharge. The evidence adduced by Respondent together with the testimony of Toth and other employees reveals that the alleged inefficiency was attributable to circumstances beyond Toth's control but that he was never asked about it. Respondent was not even aware of the fact that a problem existed at the time of Toth's discharge. Presumably Respondent adduced the evidence in an effort to support its position that Toth was working inefficiently, carelessly, and negligently at the time of his discharge. I consider that the incident adds no support to Respondent's defense in any regard.

<sup>6</sup>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 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."

<sup>7</sup>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 8, 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 discourage membership in International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local No. 85, AFL-CIO, or any other labor organization by discharging or refusing to reinstate employees or in any other manner discriminating in regard to hire or tenure of employment or any other terms or conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their guaranteed statutory rights.

WE WILL offer to Nick Toth immediate and full reinstatement in his old job or to a substantially equivalent job and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him.

WE WILL notify Nick Toth 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.

All our employees have the right to form, join, or assist labor organizations or to refrain therefrom.

ADAM LOOS BOILER  
WORKS Co.  
(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, 1695 Federal Office Building, 1240 East Ninth Street, Cleveland, Ohio 44199, Telephone 216-522-3715.