A-Z Manufacturing & Sales Co., Inc. *and* General Drivers Local No. 498, Allied Automotive and Petroleum, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 17-CA-3760

June 30, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On May 8, 1969, Trial Examiner Henry L. Jalette issued his Decision in the above-entitled proceeding, finding that the Respondent has engaged in and is engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, 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 Act, 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 findings, conclusions, and recommendations[1] 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, as modified below, and orders that Respondent, A-Z Manufacturing & Sales Co., Inc., Independence, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. In paragraph 1(b) of the "Recommended Order," delete the words "like or related" and substitute the word "other."

2. In the third indented paragraph of the notice marked "Appendix," delete the words "like or related," and substitute the word "other."

[1]Inasmuch as the Respondent's unfair labor practice strike at the very heart of employees' rights safeguarded by the Act, we shall issue a broad Order herein *N.L.R.B* v. *Entwistle Manufacturing Co.*, 120 F 2d 532, 536 (C A. 4)

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

HENRY L. JALETTE, Trial Examiner: The charge herein was filed by the above-captioned organization (herein called the Union) on December 23, 1968,[1] against the above-captioned Employer (herein called the Respondent), and pursuant thereto on February 26, 1969, the General Counsel issued a complaint alleging that Respondent had violated Section 8(a)(1) and (3) of the Act by discharging employees Jimmy Ray Brown and Bobbie Burchett because its employees joined or assisted the Union. The trial of the issues was conducted on April 10, 1969.

Upon the entire record, including my observation of the witnesses, and after due consideration of the brief filed by Respondent, I make the following:[2]

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT; AND THE LABOR ORGANIZATION INVOLVED

Respondent is a Missouri corporation engaged in the manufacture of machine parts at a facility located in Independence, Missouri. Respondent annually ships products valued in excess of $50,000 directly from its Missouri plant to points outside the State of Missouri. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

On December 20, the Union sent a telegram to Respondent in which it claimed to represent a majority of Respondent's employees and in which it requested bargaining. This telegram was delivered at 11:50 a.m. of that day. Upon receipt of the telegram, George E. DeTray, vice president of Respondent, immediately sent for his foremen and had a meeting with them. DeTray read the telegram to them and they discussed among themselves who they thought might possibly be involved. They were unable to come up with any concrete answers about who might be involved and DeTray told the foreman that any information they might find he would like to know.

This demand had come as a surprise to DeTray who was shook up by it because he thought Respondent had treated its employees fairly and justly. DeTray admitted that he instructed the foremen that he was still running the place. DeTray reinstructed the foremen about their jobs and the handling of personnel, including the admonition to go out "and watch these men." On cross-examination, Foreman Edwin Middaugh was asked the following question:

> Q. In other words, he [DeTray] more or less ordered a crack down, didn't he?
>
> MR. UHLIG: May the record show the long pause here.
>
> A. Yes, he restated the fact we were supposed to watch the employees.

[1]Unless otherwise indicated, all dates herein refer to 1968.

[2]For the reasons hereinafter set forth, Respondent's Motion to Dismiss made at the close of the trial is denied.

In the afternoon of December 20, employee Jimmy Ray Brown was working on a press which had to be set up to perform a flattening operation. Brown inserted the flattening die in the press and was told by Foreman Middaugh that he would have to install a 2 by 4 for a base. According to Brown, he got the 2 by 4 and he started setting it up when Foreman Middaugh left. Brown continued to set the machine and, believing it to be properly set, he operated it once to flatten out a piece of metal. Foreman Middaugh came back to the press and told Brown it sounded like it was a little low, that it was hitting pretty hard. Brown told him that he was taking the flattened part over to be gauged and Middaugh told him to go ahead and he would check the press. When Brown returned, Foreman Middaugh told him that he had broken the die because the press was set too low. Middaugh told Brown to remove the die and when Brown asked him what to do then Middaugh told him he was afraid this was his check. According to Brown, Middaugh said "Well, we got our orders that if anybody messed up anything, or goofs up anything or anything like that, we punch them out and send them to the office to get their check."

Middaugh told Brown to punch out, but before doing so Brown went to the restroom and was there washing his hands when Middaugh came in with Brown's timecard already punched out. He gave it to Brown and said, "Jim I don't want you to be mad at me and I don't want Bob to be mad at me, I just work here like you guys do, they gave me my orders in there this morning, I work here like you do and I have to take my orders the same as you do."

Brown told Middaugh that he was not mad at him, but that he had not set up the union deal, that it had already been set up before he began working for Respondent. (Brown had begun working for Respondent on December 16.) Middaugh replied, "Yes, but you signed." Brown had signed a union card on December 18.

Middaugh's version of the foregoing is substantially the same as Brown's, with two exceptions. According to Middaugh, he had to leave the press for some other pressing matter and as he was leaving he told Brown the press was not set right and that he was not to turn it on till Middaugh returned. Brown denied that such an instruction was given, and I am not persuaded that he was being untruthful; rather, I believe he did not hear the instruction. Employee Curtis Dawson, who corroborated Middaugh, described the giving of the instruction as follows: "He [Middaugh] started away and turned back and said, 'I will be back in a minute, don't start it up till I get back'." He did not indicate whether or not Brown heard Middaugh. No reason appears in the record why Brown would have ignored the instruction, and he had no reason to lie because Middaugh never even referred to the order in telling Brown he was discharged.

The other point of difference between Middaugh and Brown is Brown's testimony that in reply to his remark about the Union Middaugh replied, "Yes, but you signed." Middaugh denied making such a statement and Respondent contends that "Brown's bald, self-serving assertion is not in context or in character with the other portions of the restroom conversation," and that Brown should not be credited. I am not persuaded by the argument. First of all, Middaugh was not asked by Respondent to describe the conversation; rather he was asked to affirm or deny the statement and he denied it. As I read Middaugh's testimony, nowhere did he deny that Brown adverted to the union activity as a reason for his discharge; all he denied was the remark attributed to him. If Brown's uncontradicted testimony that he adverted to the union activity is credited, the alleged reply of Middaugh "Yes, but you signed" is not out of context. There is no direct evidence that Middaugh knew Brown had signed a card, but he admitted that in a meeting with DeTray they had discussed the whole employee roster. Bob Meier, Brown's brother-in-law and a friend of Middaugh's, had attended a union meeting the evening before, and there is undenied testimony that Middaugh knew that Meier had attended a meeting, albeit whether he knew it was a union meeting is left to inference. Moreover, it appears that Middaugh was suspecting everyone, as indicated below by his remark to Burchett to return some defective parts to ". . . them God damn union men . . . ." Finally, Middaugh appeared to me to be very nervous on the witness stand and I found him evasive on cross-examination, in particular when he was questioned about the instructions he had received that day.[3] Although, in the final analysis, whether or not Middaugh made the remark is not dispositive of the issue of Brown's discharge. I credit Brown.

Bobbie Burchett had been employed by Respondent for approximately 9 months and was classified as welder. On December 20, some parts had been brought back to Burchett which he had welded a few days earlier, some of which had a defective weld. Burchett asked Foreman Middaugh what he was to do with them and they checked the parts, found some in which the weld would break and others in which it would not. Foreman Middaugh told Burchett "Box them back up, send them back down to them God damn union men, let them run them."

That same afternoon, between 2 and 3 p.m., DeTray was in the paint shop and he observed an employee sorting parts out which were defective. DeTray asked him how come he had all those bad parts, and the employee replied that bad parts were being sent to him and he was supposed to sort them out and that he could not get any painting done because he was always getting bad parts. DeTray picked up some of the bad parts and took them back to Burchett. He asked Burchett if he had welded these parts and Burchett stated he had. DeTray said, "It's sloppy work, you are fired."

Burchett, who had signed a union card, testified he told DeTray if it had not been for the Union he would not have fired him. DeTray made no comment. This is undenied.

III. ANALYSIS AND CONCLUSIONS

The complaint alleges that Burchett and Brown were discharged by Respondent because its employees joined or assisted the Union. Respondent contends that company knowledge is an essential element of an 8(a)(3) violation and that as there is no evidence of company knowledge of any union activities on the part of either Brown or Burchett there can be no finding of a violation. Of course, in Brown's case, this argument is based on the premise that I would not credit Brown's testimony; as I have credited it, the argument must fail.

[3]Respondent argues that General Counsel was putting words in Middaugh's mouth when he asked him the question about a crack down as I have described above, and that Middaugh's answer should be given no probative weight. To the contrary, it was obvious to me that General Counsel had to try to put words in Middaugh's mouth, because his answers were either nonresponsive or evasive. In my opinion, Middaugh's own admissions, apart from the question and answer of a crack down, fully justify the conclusion that DeTray did order a crack down

However, I do not predicate my finding of a violation on that evidence of company knowledge, because it is not essential that company knowledge of the union activities of the discriminatees be shown in all cases; rather, it is sufficient to show company knowledge of union activity among employees and that such activity was the motivating cause for the discharges.

In *N.L.R.B.* v. *Piezo Mfg. Corp.*, 290 F.2d 455 (C.A. 2), the employer had laid off employees almost immediately after its vice president had been informed that a majority of its employees had selected the Union to represent them. The Court stated that a finding that the employer's vice president knew whether or not the employees whom he laid off had signed union authorization cards was not essential to the Board's decision and that the Board could infer from the timing of the layoffs and the statements of the vice president made almost contemporaneously with them that they were intended to discourage Respondent's employees from adhering to the Union at a period critical to its future. In my opinion, an identical situation is presented by the conduct of Respondent herein.

On DeTray's own admission, at the time he fired Burchett he was "hot under the collar." It is abundantly clear that this was because of the receipt earlier that day of the union's demand for recognition and not because of Burchett's defective work. It is undisputed that Burchett's foreman had seen the defective work earlier that day and had not even considered the matter serious enough to warrant a reprimand. Even more, he had directed that other employees cope with the problem. Yet, DeTray, without checking with anyone or seeking an explanation from Burchett, who was admittedly an excellent workman, precipitately discharged Burchett. When charged by Burchett with firing him because of the Union, DeTray had no comment. In these circumstances, including the fact that DeTray had instructed his foremen to crack down on employees upon receipt of the Union's telegram, the conclusion is inescapable that Burchett was discharged because of the union activities of Respondent's employees and in order to discourage activity on behalf of or assistance to and membership in the Union. I do not credit DeTray's denial that he was motivated by those considerations in firing Burchett.

The case of Brown is hardly different. He started the press despite instructions from Middaugh not to do so, and, as a result, he broke a die. Thus, he gave cause for discharge. This, of course, does not end our inquiry, because it is well established that the fact that there exists cause for discharge is no defense where it appears that the real reason for the discharge is union activity. *N.L.R.B.* v. *Solo Cup Co.*, 237 F.2d 521 (C.A. 8); *N.L.R.B.* v. *C & J Camp, Inc.*, 216 F.2d 113 (C.A. 5). "The circumstances of each case must be weighed to determine what motivations truly dominated the employer in laying off or discharging the employee." *N.L.R.B.* v. *Jones Sausage Co.*, 257 F.2d 878, 882 (C.A. 4).

That Brown's discharge was motivated by the union activities of Respondent's employees is evidenced by the instructions of DeTray to his foremen upon receipt of the telegram to discharge employees who made mistakes, and Foreman Middaugh's self-exculpatory remarks to Brown in the restroom. Had Middaugh not been executing the order received earlier that day, there would have been no need to give Brown the explanation which he gave him. According to Middaugh's own testimony, his reply to Brown's reference to the Union in the restroom was that he had his orders. In these circumstances, as in the case of Burchett, the conclusion is inescapable that Brown was discharged because of the union activities of Respondent's employees and in order to discourage activity on behalf of or assistance to and membership in the Union. I do not credit Middaugh's testimony that he was not motivated by these considerations in firing Brown.

In Burchett's case, Respondent did not attempt to establish that his defective work had any serious economic consequences. To the contrary, Respondent reconsidered its action and offered him reinstatement on December 24, a fact which does not militate against the finding that the discharge was unlawful. In Brown's case, however, DeTray testified at length of the adverse consequences, economic and safety, of mistakes such as Brown's. In my opinion, he grossly exaggerated. The die which Brown broke cost $25 to replace. The press was neither broken, nor rendered inoperative. Despite his testimony about how serious a matter it was to have a press "bottom out," when DeTray heard the noise made by the press when the die broke, he did not bother to check because he saw his foreman was going to check. Had the incident involved the possible dire consequences described by DeTray, he would not have entrusted the matter to a foreman. As to Middaugh, it is noteworthy that his only comment to Brown was that he had broken the die. He was not admonished that his carelessness could have broken the press; no reference was made to his failure to abide by instructions not to start the press. In fact, a study of Middaugh's conduct and statements reveals that his only concern was that he comply with the instructions of the day to crack down on employees.

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 its operations 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 thereof.

V. THE REMEDY

Having found that Respondent violated Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent discriminatorily discharged Jimmy Ray Brown, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges and to make him whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his discharge to the date of the offer of reinstatement, less net earnings, to which shall be added interest at the rate of 6 percent per annum in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716. In like manner I shall recommend that Respondent make Bobbie Burchett whole for any loss of earnings he may have suffered by reason of the discrimination against him from the date of his discharge to the date of his reinstatement. However,

inasmuch as Burchett has been reinstated no order of reinstatement is herein required.

Upon the foregoing findings of fact, and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. A-Z Manufacturing and Sales Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. General Drivers Local No. 498, Allied Automotive and Petroleum, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Bobbie Burchett and Jimmy Ray Brown because of the union activities of its employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (3) and 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this case, I hereby issue the following:

RECOMMENDED ORDER

Respondent, A-Z Manufacturing and Sales Co., Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of General Drivers Local No. 498, Allied Automotive and Petroleum, affiliated with the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen and Helpers of America, or any other labor organization, by discriminating in regard to the hire or tenure of employment or any terms or conditions of employment of its employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, 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 as guaranteed by Section 7 of the Act, or to refrain from any or all such activities.

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

(a) Offer Jimmy Ray Brown immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges.

(b) Make Jimmy Ray Brown and Bobbie Burchett whole in the manner set forth in the section of the above Decision entitled "The Remedy."

(c) Notify the above-mentioned employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service and Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board and its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records relevant and necessary to a determination of the amounts of backpay due under the terms of this Recommended Order.

(e) Post at its Independence, Missouri, place of business copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and 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.

(f) Notify the said Regional Director, in writing, within 20 days from the date of this Decision, what steps Respondent has taken to comply herewith.[5]

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[4] 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 If the Board's Order is enforced by a decree of a 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."

[5] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director for Region 17, 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 offer to Jimmy Ray Brown immediate reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights or privileges, and WE WILL make him and Bobbie Burchett, who has been reinstated, whole for any loss of pay they may have suffered by reason of the discrimination against them.

WE WILL NOT discourage membership in General Drivers Local No. 498, Allied Automotive and Petroleum, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily discharging any of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the Union named above, or any other labor organization, to bargain through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

All our employees are free to become and remain members of Local No. 498, Allied Automotive and Petroleum, affiliated with the International Brotherhood

of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

A-Z MANUFACTURING & SALES CO., INC.
(Employer)

Dated By
(Representative) (Title)

Notify the above-mentioned employees if presently serving in the Armed Forces of the United States of their 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.

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, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106, Telephone 816-374-5181.