

Wabash Smelting, Inc. and Richard A. Burns. Case
25-CA-4253

February 15, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS
AND KENNEDY

On November 4, 1971, Trial Examiner George J. Bott issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief, and Respondent filed a document excepting in part and supporting in part the decision of the Trial Examiner.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

GEORGE J. BOTT, Trial Examiner: Upon a charge of unfair labor practices filed by Richard A. Burns on April 12, 1971, against Wabash Smelting, Inc., herein called Company or Respondent, the General Counsel of the National Labor Relations Board issued a complaint on June 30, 1971, alleging that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, herein called the Act, by discharging Burns. Respondent filed an answer, and a hearing was held before me at Wabash, Indiana, on September 14 and 15, 1971. Subsequent to the hearing, briefs were received from Respondent and General Counsel.

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

FINDINGS OF FACT

I JURISDICTION OF THE BOARD

Respondent, an Indiana corporation, maintains its principal office and place of business at Wabash, Indiana, where it is engaged in the production of secondary aluminum. During the year prior to the issuance of the complaint, Respondent distributed from its Wabash plant goods valued in excess of \$50,000 to States other than the State of Indiana.

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.

II THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, herein called the Union, is a labor organization within the meaning of the Act.

III THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and the Issue

Respondent's production and maintenance employees at its Wabash facility have been represented for many years by the Union, but a group of laboratory and other employees, numbering approximately 15, are unorganized. In March 1969 and August 1970, Board elections, which the Union lost, were held among these employees, and Burns, the Charging Party, played some role in each instance in assisting the Union in its campaign. On March 25, 1971, Burns was discharged "for poor industrial conduct and (for) being extremely difficult to supervise," according to the Company's records and its contention here. It is clear that during the week of March 7, 1971, Burns had certain conversations and encounters with Shaw, his immediate supervisor, in which he expressed extreme displeasure with Respondent's treatment of him, but General Counsel contends that Respondent did not actually discharge him because of these incidents, but used them as a pretext to conceal its real reason for termination, namely, Burns' previous union activities.

B. Events Immediately Surrounding Burns' Termination

Respondent reviews the work of each employee annually to determine whether a wage increase is warranted. In early March 1971, Aviles, Respondent's production manager, reviewed and rated Burns on a form used for that purpose. On the basis of his rating, which was based in part on the advice of Shaw, Burns' immediate superior in the laboratory, Aviles determined that Burns should not be recommended for an increase. Personnel Manager Rogers reviewed the rating and agreed with Aviles' decision, entering his initials and the date 3/8/71 on the form with his concurrence. George Nagle, Respondent's president, ratified the lower echelon's position by initialing the wage review form on March 9, 1971, and by adding the notation that the employee should be reviewed again in 90 days.

On March 8, when Burns reported for work, Shaw privately advised him that he would not be given a wage increase. This information angered Burns and there can be no question that in the presence of other laboratory employees, he expressed his disappointment loudly, pungently, vulgarly, and profanely to Shaw, indicating that Shaw was at least partially responsible for his not getting a raise. Employer Barker witnessed this and other incidents in which Burns was involved that week, and I rely on his testimony, which appeared to me to be restrained and objective, to help resolve the conflict between Shaw and Burns as to the degree of industrial irreverence Burns displayed.

Barker testified that on March 8 he heard Burns, in a loud, angry tone, complain to Shaw about the denial of a wage increase and state that he would never seek a raise through him again. In voicing his displeasure, Burns frequently used profanity as well as the phrase "son of a bitch," according to Barker, who also recalled that Burns vulgarly told Shaw where he could "shove it." He did not, however, hear any threats or hear Burns make any reference to any other representative of Respondent.

Shaw testified that Burns "exploded" when he heard about his raise being denied and profanely and vulgarly accused him of never having done anything for him, asserting that he would never seek Shaw's aid in this area again. Burns asked why the increase had been denied, but Shaw professed ignorance even though he was aware he said, that the denial was based on Burns' "poor conduct and his work." Shaw also said that Burns not only told him where to put the raise, but also included Nagle, president of Respondent and Rogers, personnel manager, in his suggestion, but more importantly, he stated that Burns added that Rogers had "better watch out," because "somebody (was) going to get him."

On Tuesday, March 9, Burns was still angry about the "situation," as employee Barker described it, and used profane and vulgar language to Shaw as frequently as he had on the previous day. Shaw testified that on March 9, when Burns arrived at the laboratory early, as was his custom, Shaw asked him to perform certain work, but Burns, loudly and angrily, using the same kind of profane and vulgar language in the presence of other employees as he had the day before, advised him to "shut up," because he did not intend to commence work until 4 o'clock, Shaw said that he tried to calm Burns in this instance as he had the day before and also warned him that he could not tolerate his display of temper. Employee Stefanatos, whose testimony I credit, recalled that on or about that date, Burns "blew up" and was "loud" and "profane" when Shaw asked him to do something, and that he told Shaw that he was not going to start work until 4 p.m.

It is also clear that Burns was angry with Shaw on Thursday, March 11. According to Shaw, shortly before the start of the shift, Burns violently burst into the laboratory swearing loudly and accused him of cheating him out of 15 minutes overtime. Burns poked his finger at Shaw, and as Shaw retreated, Burns followed him around the table. Shaw said he tried to explain that an honest mistake had been made, which he would correct, but Burns would not accept his explanation and insisted that this kind of cheating had occurred before. Shaw also testified that Burns, as he had with the wage increase, told Shaw where he, Nagle, and Rogers could put the pay for the 15 minutes overtime he had been deprived of.

Shaw's version of Burns' actions on March 11 was corroborated in most respects by Barker and Stefanatos, whose testimony I have already indicated is credible, as well as by Larry Veverka, son of Respondent's vice president and an employee. Barker said that Burns was very upset about the shortage, and although Shaw promised to remedy the error, Burns remained angry and, using profanity loudly, insisted that a principle was involved. Barker said he could not remember exactly the words which Burns used, but remembered the scene very well, because anyone who had "seen a fight brewing would recognize" it.

Stefanatos, a witness called by General Counsel on another matter, heard Burns accuse Shaw of "cheating or erasing his time" on March 11. Burns was loud and profane, according to Stefanatos, and, gesturing with his finger, he backed Shaw around a table. Burns was "shaking" and "mad," and when he made a fist, Stefanatos thought he was going to hit Shaw.

Veverka's account of the March 11 incident between Burns and Shaw caused by the overtime shortage was essentially like Stefanatos' and, except for his claim that Burns directly questioned Shaw's parentage, which Burns credibly denied, although admitting that the classical phrase might have passed his lips, I credit him generally. I also credit his undenied testimony that later that day Burns told him that if he had not been concerned about being discharged, he would have hit Shaw.

Burns testified that there were discussions with Shaw about a raise in March 1971 and that Shaw finally told him that the result of his wage review was negative. He also testified about the overtime shortage and his discussion with Shaw about it, and although his account does not reveal the same degree of emotional reaction described by the witnesses whose testimony has just been outlined, he stated that he told Shaw that he did not believe his explanation and that he had shorted him and others before. He admitted telling Shaw where "to stick it," but he denied mentioning Rogers' or Nagle's names or threatening them in any way. He did not specifically deny the main thrust of the testimony which portrayed him as angry, loud, vulgar, profane, insulting, and aggressive in his encounters with Shaw during the week in question.

I find, therefore, on the basis of the partially undenied testimony of Shaw, as corroborated by Stefanatos, Barker, and Veverka, that Burns, by his language and conduct from March 8 through March 11, openly displayed an attitude of hostility and belligerence toward his supervisor, accusing him of lying, cheating, lack of integrity, and general responsibility for Burns' problems.

Although I find that Rogers' name was mentioned at some point in the Shaw-Burns encounters—Shaw told Burns that personnel was responsible for his failure to get a wage increase or for the shortage in overtime, according to Burns, I do not find that Burns uttered any threats against Rogers. No evidence that he did appears in Barker's, Stefanatos', or Veverka's testimony, and although I thought Burns was sometimes confused and tended to see only the righteousness of his own cause and the error in Respondent's, I did not think he was deliberately attempting to mislead or conceal. On the other hand, neither did I think Shaw's objectivity was unquestionable or his recall perfect. I do not believe, for example, that he told Burns that his case would be reviewed again in 90 days the same time that he told him that he had been turned down for a wage increase. I find, therefore, that Burns did not threaten "to get" Rogers as Shaw testified.¹

Shaw reported to his superior, Aviles, what had occurred between him and Burns, and Aviles arranged a meeting with Rogers on March 12 to discuss Burns' conduct. No final decision regarding Burns was made at the meeting, but Aviles testified that he decided at that time to look for a laboratory replacement for him. Shaw was instructed after the meeting to make a written report on the incidents in which Burns was involved, which he did that weekend, and gave to Rogers on Monday, March 15.

On March 15, 1971, Rogers transmitted a memorandum to Nagle, to which he attached Shaw's report on Burns, and in which, he noted, after referring to the recent withholding of a wage increase for Burns, that Shaw's report indicates that Burns made many obscene and violent remarks which were directed at you, myself and this company concerning a mistake made in his pay and the results of his review." Rogers indicated that Aviles had decided to terminate Burns if he continued "to express this negative attitude," and he stated that he concurred in Aviles' recommendation Rogers conceded at the hearing that he had made up his mind about Burns having engaged in misconduct even before he met with him and questioned him about it as described next, because he credited Shaw's account of Burns' behavior.

¹ At a meeting with Burns on March 19, 1971, as found later and admitted by Burns, Rogers spent considerable time accusing Burns of having threatened him, which Burns denied. It would seem, therefore, that unless Rogers was putting on some kind of act, which I doubt, he thought that Burns had threatened him in some way.

Rogers, Aviles, and Shaw met with Burns on March 19 for a half hour or more and confronted him with Shaw's charges against him. Rogers was the principal spokesman for Respondent. At the meeting, according to the credited testimony of Rogers, which is substantially corroborated by Aviles and Shaw, Rogers read portions of Shaw's report to Burns and told him that he could be discharged for such conduct. Burns categorically denied everything and insisted on talking about other subjects, such as Respondent's practice of having laboratory overtime performed by supervisors. Rogers also explained, as Burns conceded, that his eligibility for a raise in wages would be considered again in 90 days. Burns also agreed that Rogers spent some time accusing him of having threatened him.

According to Rogers, Shaw, and Aviles, Burns' attitude was generally negative, he conceded nothing and there was no indication from him that there would be any change in him in the future. At one point he told the company representatives that if they had cause to fire him, they should do it. Burns testified that he had no recollection of making such a remark, but he also volunteered that he "wasn't particularly worried whether they fired me or not."

Burns was asked to leave the March 19 meeting while Rogers, Aviles, and Shaw discussed the matter. During their discussion it was decided that Burns should be terminated, but that Nagle, who makes the final decision in these matters, should be consulted. Rogers then advised Burns to return to his job.

When Burns reported for work on March 25, Shaw sent him to Rogers who terminated him, giving as Respondent's reason, "poor industrial conduct, his inability to be supervised," as Rogers and Burns both testified. Rogers credibly explained that the termination had been delayed until he could speak with Nagle who was out of town. Early in the week following the meeting on March 19, he advised Nagle of what he, Aviles, and Shaw had decided, and he expressed fear over how Burns might physically react to supervision in the future. Nagle approved the discharge, and Rogers effected it.

C. Burns' Union Activity and Respondent's Opposition to the Union

A Board representation election was held in March 1969 among Respondent's unrepresented factory employees, including laboratory technicians, draftsmen, central storeroom employees, and certain plant clericals. Two unions, the Boilermakers and Allied Industrial Workers Union, were on the ballot in this election, and Burns attended two union meetings and signed an authorization card for Allied Industrial Workers Union. The second union meeting was held at Burns' home, and some time after it occurred, but prior to the election, he found himself in President Nagle's office discussing the coming election. Nagle testified that since his plant superintendent told him that Burns wanted to talk about the election, he agreed to see him. According to him, during a conversation in his office, Burns volunteered to give the company information and other aid in the election, but he refused to discuss the matter. He did not specifically deny Burns' testimony that he asked Burns and Burns told him where the recent union meeting was held and who attended it and that he stated that he would take legal and other steps to prevent a union victory. I credit Nagle's testimony that Burns sought an interview with him and made statements to him indicating support for the Company and personal opposition to the union activity, but I also credit Burns' testimony, however, that Nagle interrogated him and expressed his intention to thwart the effort to organize the Respondent's unrepresented employees, for not only was his testimony not clearly denied,

but, based on my observation of the two, Burns' recall of events was clearer and more reliable in this instance than Nagle's.

Another Board election was held among the same group of unrepresented employees in August 1970, but this time only the Boilermakers appeared on the ballot, and Burns was at least partially instrumental in getting the Boilermakers to make this effort to organize the employees. He attended union meetings and he secured the signatures of a few employees to union cards. He also acted as the Union's observer at the election, which the Union lost by a vote of 12 to 2.

Prior to the 1970 election and at a time when Burns was soliciting for the Boilermakers, he had a conversation with Plant Superintendent Aviles about the Union. Burns testified that Aviles asked him if he knew anything about a union trying to organize the employees, and Burns replied that he did. Aviles then wanted to know if the union had secured enough authorization cards to get an election, and Burns informed him that it had not at the time, but would have no trouble getting the required number. Burns also told Aviles, in answer to his question as to why the employees wanted a union, that if any employee needed a union it was one who worked for Supervisor Shaw.

Aviles recalled the incident which Burns described, but he said Burns walked into his office uninvited and volunteered some suggestion about how the Company could keep the Union out of the plant. During these remarks, Burns indicated that money would be available to "buy votes" and that he could "swing the election" in some manner. According to Aviles, he and Shift Supervisor Maples, who was present, merely listened to Burns, but said nothing.

Maples could not recall who began the conversation about the Union, but he remembered Burns making a suggestion about how Respondent's president, Nagle, could keep the Union out of the plant, and he also recalled "talk . . . of two unions, one of them being the Boilermakers and another union being brought in and the two of them, one being used against the other." Aviles made some comments, Maples recalled, but whatever they were they did not make a lasting impression on him.

Here again there was more said at this meeting between management and an employee than would appear from their separate versions. First of all, after hearing Maples testify, Burns testified that his memory was refreshed and that he had suggested that if there were two unions on the ballot, as there had been in the first election, the Boilermakers might be defeated, but he said that this suggestion was made only after Aviles asked him how to prevent the Boilermakers from winning the election. On the other hand, Maples' recall about what was said and in what period it all happened was very poor and he seemed exceedingly embarrassed about having to testify at all. This is here again no flat contradiction by him or by Aviles of Burns' claim of interrogation. I credit Burns, and I find that Aviles interrogated him about the union activity and indicated Respondent's opposition to the Union's efforts to organize the employees involved.

Subsequent to Burns' talk with Aviles and Maples, as just described, but prior to the election, Shaw frequently interrogated him about union activity, according to Burns' uncontradicted testimony. On more than one occasion Shaw asked him how many authorization cards the Union had secured. Later, Shaw asked Burns more than once to get his authorization card back from the Union, and Burns promised that he would. Shaw persisted in trying to find out from Burns if he had gotten his card back, and Burns finally but untruthfully said he had. When Shaw asked to see it, Burns told him that it was none of his affair, and refused to produce it.

Shaw also interrogated employee Stefanatos. Stefanatos had signed a union card for Burns prior to the 1970 election, and Shaw asked him if he had signed one. Sometime later Shaw asked him if he were going to get his card back from the Union like employee Mitting had, and advised him how he could go about doing it. Stefanatos also testified without contradiction that a few weeks after the August 1970 election Shaw asked him who had signed him up for the Union and that he reluctantly admitted that it was Burns after Shaw indicated that he had "a pretty good idea" who had.

At or about the same time, in general conversation in the laboratory among employees, Shaw asked the employees who they thought had voted for the Union in the election.

Shaw was responsible for employee Mitting seeking the return of his card from the Union, according to Mitting's and Rowland's uncontradicted testimony. Rowland, president of the Boilermakers' local which represents the production employees, had been active in trying to organize the laboratory and other unrepresented employees. Some time after Burns and others had given Rowland some signed authorization cards, Shaw approached Rowland with Mitting and told him that Mitting wanted his union card back. Rowland agreed to have Mitting's card returned to him after Mitting explained to him that he was under "pressure" from the Company. Mitting testified that although he denied that he had signed a union card when Shaw first asked him, he finally admitted it when asked again. When sometime later Shaw asked him if he wanted to get it back, he said he did, and they went to talk with Rowland. Thereafter Shaw frequently asked him if the card had been returned to him. In addition to inquiring about Mitting's own activities, Shaw frequently asked him prior to the election if he would find out who else had signed union cards. Mitting said he did not "think" he told Shaw where he got his union card.

D. Analysis and Conclusions

Burns was a competent laboratory technician who appears to have had during his 4 years of employment no significant job problems or any difficulty in getting along with his supervisors until March 8, 1971, but on March 25, he was discharged and told it was because of his "poor industrial conduct" and because he was "extremely difficult to supervise." Burns was active in securing union authorization cards during the Union's second attempt to organize Respondent's unrepresented employees and he served as a union observer at the election in August 1970. I have found that Respondent twice opposed the entrance of a union into its plant and that prior to the 1970 election it learned by coercive interrogation that Burns had signed a union card himself and had successfully solicited other employees for the Union. Thereafter, Respondent, through Shaw, Burns' immediate superior, encouraged Burns to withdraw from the Union, but Burns resisted Shaw's urgings toward the end.² Finally, Burns' discharge is bottomed primarily on alleged "misconduct"

growing out of his relations with Shaw, the very supervisor who had harassed him in connection with his union activity. In these circumstances, a valid explanation for the employees' termination was required from Respondent.

Nevertheless, despite what has been found, this is not the kind of case, as the whole record reveals, where these factors which have just been outlined, taken with the timing of the discharge and the existence of patent defects in the reason offered to explain it, will support a finding that the asserted reason is pretextual and the real reason discriminatory. First of all, the timing of the discharge in the circumstances of this case is not especially significant. The election in which the Union had been soundly defeated took place 7 months before Burns was fired, and since the Union received only 2 of the 14 votes cast in the election, it does not appear to have been an obvious threat to Respondent thereafter. In any case, there is no evidence in the record of any union activity on Burns' or any other employee's part or of Respondent's resistance to it after August 1970.

The most important factor, moreover, which militates against a determination that the discharge was based on union considerations is that Respondent's reasons given for it do not appear at all illogical or unreasonable from an industrial relations point of view, and I have found that the employee repeatedly engaged in the conduct Respondent charged him with.

Three times during the week of March 8, 1971, Burns, in the presence of other employees, in the course of his normal contacts with his supervisor, without provocation displayed a hostile attitude toward him which any supervisor would be expected to resent. I have found in greater detail above that during the week Burns was generally loud, angry, and profane in his discussions with Shaw, and on occasion he was vulgar and also uncooperative. In addition, he questioned his supervisor's honesty and his effectiveness as a supervisor, and he belligerently advanced on him as he berated him for what he thought was his unfair treatment in failing to pay him for overtime worked. Management cannot be faulted for viewing this behavior as "poor industrial conduct," for it was certainly not good industrial conduct, and for considering Burns "extremely difficult to supervise," because the supervisor's life that week was not easy. Shaw could reasonably have believed that Burns was a threat to plant order and discipline as well as to him personally, as he and other of Respondent's witnesses testified. I also note in connection with Respondent's explanation for Burns' discharge that all throughout the history of his case, including an unemployment compensation hearing before a referee of the Indiana Employment Security Division, Respondent did not shift or put forward inconsistent reasons for disapproving Burns' actions and for ultimately terminating him. On the other hand, although the issue in the unemployment compensation hearing was different from the issue here, at that hearing Burns attributed his discharge to Rogers' alleged resentment of certain remarks Burns had made about Rogers' conduct away from the plant, something quite unrelated to any union activity on Burns' part or to any of his encounters with Shaw. I find that Respondent's explanation for Burns' termination is not pretextual.

² Respondent's efforts to frustrate union efforts to organize, such as by interrogation of Burns and others, are not alleged as violations of the Act, because they are barred by Section 10(b) of the Act, since the charge was filed on April 12, 1971.

DECISIONS OF NATIONAL LABOR RELATIONS BOARD

I find and conclude that General Counsel has not established by a preponderance of the evidence that Respondent discharged Richard Burns in violation of Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

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

1. Respondent is an employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. Respondent has not violated Section 8(a)(1) and (3) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

The complaint is dismissed in its entirety.